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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 721

COMMERCIAL BARGE LINES, INC., et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Commercial Barge Lines, Inc., American Commercial Barge Line Company, and Commercial Transport Corporation, plaintiffs-appellants, submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, filed August 21, 1958, is reported in 166 F. Supp. 867, and is appended hereto as Appendix A.

The report of the Interstate Commerce Commission under review is found in 300 I.C.C. 66 and is appended hereto as Appendix B. Its order, which makes the report a part thereof, is appended hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-25, 5 U.S.C. § 1009 and 49 U.S.C. § 17(9), to enjoin and annul an order of the Interstate Commerce Commission.

The judgment of the three-judge District Court dismissing the complaint was entered on October 27, 1958. Notice of appeal was filed in that court on December 24, 1958.

Jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). It is sustained by a large number of cases including the following: *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); *United States* v. *Missouri P.R. Co.*, 278 U.S. 269 (1929).

STATUTES INVOLVED

The question as to the jurisdiction of the Interstate Commerce Commission[1] presented on this appeal requires

[1] Hereinafter referred to as the Commission.

the construction and application of the following provisions of Part III of the Interstate Commerce Act, 49 U.S.C. §§901 *et seq.*:[2]

Section 303(b) [49 U.S.C. § 903(b)]:

"(1) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. • • • For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. • • •"

Section 303(f)(2) [49 U.S.C. § 903(f)(2)]:

"(f) Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—

• • •

"(2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a . . . water carrier subject to this part, . . . in the performance of . . . towage; but such transportation shall be considered to be performed by such carriers . . . as part of, and shall be regulated in the same manner as, the transportation by . . . water to which such services are incidental."

QUESTION PRESENTED

Has the Commission unlawfully extended its jurisdiction under Part III of the Act by holding inapplicable the § 303(b) exemption to the transportation of three or less bulk commodities when the tow operator renders incidental towage for a certificated water carrier, exempt under § 303(f)(2), in the same tow.

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[2] Hereinafter referred to as Part III of the Act and by the section numbers thereof.

STATEMENT OF THE CASE

Section 303 of the Act contains a number of exemptions from regulation, of which two are directly involved here. One exempts from regulation the service of the tower in performing incidental towage for a certificated carrier (§ 303(f)(2)). The other exempts from regulation the transportation of bulk commodities when no more than three such commodities are carried in a single tow (§ 303 (b)). Soon after the passage in 1940 of Part III of the Act it was recognized that the interrelation of these two exemptions was of crucial importance to the water traffic of the Mississippi River system.

Many carriers engaging in the barge traffic of the Mississippi River system were in the early 1940's and are today exempt from regulation and certification under the Act. The primary business of these carriers—for the most part small carriers—was and is the transportation for shippers of bulk commodities, such as coal, grain and sulphur, in tows exempt under § 303(b).

In the early 1940's, after passage of Part III of the Act, certificated water carriers serving shippers of non-bulk freight were faced—as they are today—with the need of augmenting their power requirements by means of towage services secured from such non-certificated carriers. To secure such towage necessarily meant adding a barge of non-bulk freight to the solid bulk tows being transported by the non-certificated carriers for shippers. That could be done only if the barge of non-bulk freight to be towed for the regulated carrier under the § 303(f)(2) exemption need not be "counted" in applying the § 303(b) exemption to the non-certificated carrier's tow.

So that there might be no question as to the exemption of such towage and transportation, a ruling by the Commission was sought. After a lengthy exchange of views with counsel for interested water carriers (Complaint, Exhibit A), the Commission, by a letter dated March 27, 1944 from the Assistant Director of the Commission's Bureau of Water Carriers, informed the carriers that such towage and transportation were exempt by statute from regulation and so outside the Commission's jurisdiction (Complaint, Exhibit B):

> The division [Division 4 of the Commission] is of the opinion that if to an otherwise solid tow of coal or any other commodities in bulk coming within the exemption provided in section 303(b), there were to be added a barge of package freight to be handled by the tower under conditions which would make it exempt under section 303(f)(2), if handled seperately, such inclusion would not destroy the exemption under section 303(b) as to the commodities in bulk, or under section 303(f)(2) as to the package freight.

This opinion of the Commission remained undisturbed for a period of 13 years—until the date of the Commission's order here involved.

During that period, both certificated carriers—such as appellant, Commercial Barge Lines, Inc.—and non-certificated carriers conducted extensive operations on the basis of the 1944 opinion.

During that entire period there was not a single indication that Congress or any Committee of Congress disagreed with the Commission's interpretation and application of the Congressional language in §§ 303(b) and 303(f)(2).

However, in 1956 certain certificated carriers—who are now intervening defendants-appellees in this case—attacked the 1944 opinion. They did so as protestants in a merger

proceeding under § 5 of the Act involving the properties of the appellants herein. Some of the entities seeking § 5 approval were certificated water carriers; one was a non-certificated water carrier. The protestants, for one ground, asserted that it would be contrary to the public interest for the non-certificated carrier entity involved in that case to transport bulk freight for shippers under the § 303(b) exemption if its tow contained at the same time a barge of non-bulk freight being towed for a certificated carrier under the § 303(f)(2) exemption.

In order to dispose of that objection definitively appellants petitioned the Commission to institute a declaratory order proceeding under § 5(d) of the Administrative Procedure Act [5 U.S.C. 1004(d)] so that the proper construction of §§ 303(b) and 303(f)(2) and the jurisdiction of the Commission thereunder might be settled in a formal decision [Complaint, Exhibit C].

By order of September 28, 1956 the Commission granted appellants' petition and authorized interested persons to file their presentations and briefs addressed, *inter alia*, to the following question (Complaint, Exhibit D):

> If to an otherwise solid tow of dry-bulk commodities, being transported by the operator of the tow for shippers, there is added a barge of non-bulk commodities to be handled by the tower under conditions which would make such a barge exempt as to the tower under section 303(f)(2) if handled separately, does such inclusion have the effect of making inapplicable either the exemption under section 303(b) of the commodities in bulk or the exemption as to the tower under section 303(f)(2) of the barge containing the non-bulk commodities?

On March 20, 1957, Division 4 of the Commission issued its Report [Appendix B hereto]. With one of its three members strongly dissenting, it ruled in respect to the foregoing question:

1. That towage of a barge of non-bulk freight is exempt from regulation under § 303(f)(2) even when such towage is performed in the same tow with bulk commodities being transported by the carrier for shippers.

2. That towage of a barge of non-bulk commodities under § 303(f)(2) in a tow containing bulk freight being transported for shippers by the operator of the tow subjects the transportation of the bulk freight to regulation under the Act, even though, absent the towed barge of non-bulk freight, the transportation of the bulk freight would be exempt from regulation under § 303(b).

It is the Commission's ruling stated in Paragraph 2 above that is now before the Supreme Court. Appellants' petition for reconsideration of this ruling was denied by order of the Commission on June 17, 1957. Appellants thereupon brought this suit in the District Court to obtain judicial review. The District Court sustained the Commission's interpretation of §§ 303(b) and 303(f)(2) and the Commission's determination of its jurisdiction thereunder.

THE QUESTION PRESENTED IS SUBSTANTIAL

The decision in this case will not only determine whether the jurisdiction of the Commission should be extended into an exceedingly important area of transportation. It will also determine whether or not there should be prohibited an efficient and economical method of operation which up to the 1957 decision was followed throughout the barge industry as authorized by an earlier (1944) ruling of the Commission with respect to its jurisdiction.

It is necessary to look at the practical application of the Commission's reinterpretation of the Act to see its full incongruity. The typical situation in which an unregulated tower seeks simultaneously to apply the two exemptions—§303(b) and §303(f)(2)—is where his own barges (containing a bulk commodity) are joined in the same tow with another barge (containing packaged freight), owned by a regulated carrier who has need of the incidental towage service which this unregulated tower is in a position to provide. This tow, the Commission now says, is illegal, and the unregulated tower must either get a certificate or separate the tow into two units.

The Commission takes the view that its interpretation, although limiting the effect of §303(b), the bulk commodity exemption, has left fully operative the incidental towage exemption—§303(f)(2). Realistically, however, the Commission has destroyed both exemptions. In practice the unregulated bulk tower will refuse to provide any of the incidental towage service which the certificated carrier desires, since otherwise the tower will be unable to carry on his principal business without violating the law.

In deciding this very question 15 years ago, the Commission avoided this incongruity by finding that it had no jurisdiction over this area. For 13 years the business of water carriage was carried on accordingly. During those 13 years neither Congress nor any Congressional Committee disagreed with the Commisson's 1944 interpretation of the limits of its jurisdiction.

Without any legislative authorization, the Commission has now sought to expand these well-established jurisdictional limits. It has done so in a 2-to-1 decision by Division 4, with one Commissioner sharply dissenting on the precise question presented by this appeal.

In rendering its opinion, the Commission was of course not exercising its expertise as to a regulated industry; it was instead passing upon a purely legal question of statutory construction and deciding the limits of its own jurisdiction as established by Congress.

The question of the Commission's jurisdiction in this situation, where two exemptions from jurisdiction are construed by the Commission as defeating each other, is of concern to the whole of the inland water carrier industry, is a novel question and is here presented to the Supreme Court for the first time. No other appellate court has ruled on it. Nor is there any case law supporting the decision below. The District Court cited no authority in support of its decision other than one case dealing with the question of statutory construction generally. And the only case upon which the Commission relied—*American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796—did not even deal with the effect of the §303(f)(2) exemption on the §303(b) exemption.

The importance and novelty of the question presented require that this appeal should receive the definite consideration of the Supreme Court. This is shown by the nature of the errors reflected in the Commission's reinterpretation:

1. The Commission has achieved this extension of its own jurisdiction by a reinterpretation of the Act which (a) has the effect of reading out of the Act one of its most clearly expressed commandments, (b) ignores the Congressional purpose plainly expressed in the legislative history and (c) logically leads to still further extensions of jurisdiction, even in situations where this result seems manifestly absurd.

2. The Commission's reinterpretation of Part III of the Act is contrary to the purposes thereof in that (a) it effectively destroys the towage exemption in §303(f)(2) in the only situation where it has practical value, and (b), adversely affects the efficiency and economy in transportation which the regulatory system adopted by the Congress, as administered under the National Transportation Policy, sought to preserve.

I.

A. The Commission has defied the Act's express commandment.

The Commission's present interpretation of the Act is in direct contravention of the clause with which §303(f)(2) commences: "Notwithstanding *any* provision of this section or of section 302,[3] the provisions of this part shall not apply" to towage for a regulated carrier. (Emphasis supplied).

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[3] §302 (49 U.S.C., §902) defines the terms used in Part III of the Act. The following sub-paragraphs are pertinent here:

(c) The term "water carrier" means a common carrier by water or a contract carrier by water.

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(e) The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) of this section and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

In defiance of this command, the Commission's interpretation of §303(b) depends entirely on the application of that section and the terms used therein—including terms defined in section 302—to §303(f)(2) exempt towage. In interpreting §303(b) the Commission has:

(1) classified the §303(f)(2) exempt towage as "transportation by a water carrier" under Part III of the Act generally and under §303(b) in particular;

(2) designated the exempt towage as "carrying" under the Act generally and under §303(b) in particular; and

(3) given to the added barge of non-bulk freight, which is clearly exempt as to the tower under §303(f)(2), the same recognition in the regulatory scheme as would be given to that barge if it were being transported for a shipper by the operator of the tow under full regulation as to him.

(Footnote continued)

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this chapter and chapters 1 and 8 of this title, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water". • • •

(h) The term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, elevation, transfer in transit, refrigeration or icing, ventilation, storage, and handling of property transported or the interchange thereof with any other agency of transportation.

The Commission had to apply the provisions of Part III of the Act to the §303(f)(2) exempt towage in each of the foregoing ways to reach its conclusion; it could destroy the §303(b) exemption and thus extend its jurisdiction into a wholly new area, only upon concluding that the towage of the barge of non-bulk freight under §303(f)(2) constitutes "transportation by water", and "carrying . . . more than three such [bulk] commodities".

The Commission vitiated and rejected the express command of §303(f)(2) not only by applying the provision of §303(b) and the tests set forth therein—a "provision in this section"—to §303(f)(2) exempt towage, but also by treating the tower as a "carrier" and the service of towage as "transportation" within the meaning of those terms as defined in §302. However, those defined terms, wherever used throughout Part III of the Act, including §303(b), are made inapplicable to §303(f)(2) exempt towage by the plain statutory command that "notwithstanding any provision . . . of §302, the provisions of this part shall not apply to" the exempt towage under consideration. The clear meaning of the phrase last quoted, a meaning completely confirmed by the legislative history, is that the person performing §303(f)(2) towage is not "a carrier", and the service is not "transportation", within any portion of the regulatory scheme in Part III of the Act.

This analysis is borne out by the very character of the §303(f)(2) exemption. Unlike the §303(b) exemption, which is an exemption as to transportation, §303(f)(2) exempts only the service of the tower. The transportation performed for the shipper is fully regulated in the name of the principal in the transaction, the certificated carrier. The relation of the §303(f)(2) exempt tower to the transportation is in this respect no different from that of a hired deckhand serving the certificated carrier. Section

303(f)(2) therefore in effect says: "The tower under these circumstances does not have the status of a carrier and his services do not constitute transportation within the meaning of Part III of the Act." So read, towage under §303(f)(2) can have no effect on the qualifications for the exemption in §303(b), since that exemption becomes inapplicable only when there is in a particular tow "transportation by a water carrier" which is in addition to the transportation of three or less bulk commodities.[4]

B. The Commission has disregarded the announced Congressional purpose.

The legislative history of §303(f)(2) requires the same conclusion as its express language. This legislative history received no consideration from the court below or from the Commission. It is here summarized only sufficiently to indicate its substantial nature.

As it passed the Senate, the bill which became Part III of the Act (S. 2009, 76th Congress,) dealt with the towage exemption in the definition section, §309(9), as follows:

> "The term 'common carrier' by water means, [etc.] ... Provided, that persons acting in the capacity of agents for common carriers subject to this Act in providing towage shall not be deemed common carriers by water ..."

When the Senate bill reached the House, the House substituted and passed its own bill in place of the Senate bill.

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[4] Business conducted in a § 303(b) tow can of course extend to all sorts of services, such as the operation of a company store for employees, the display of advertising signs, the operating of a traveling filling station for boats on the river, the operation of a commercial radio station, etc., without subjecting the transportation of the bulk freight therein to the Commission's jurisdiction, because such other services do not constitute "transportation by a carrier".

The House bill also dealt with a towage exemption in the definition section, §302, as follows:

> " . . . the performance of towage . . . for a common carrier by water . . . shall not be considered to be transportation within the meaning of this paragraph."

At this point, the language in both the House and Senate bills makes clear beyond doubt the status of the tower as a non-carrier and the status of the service as not transportation within the meaning of any provision in Part III of the Act, including § 303(b).

When the bills went into conference, the Conference Committee reported a revision which was accepted and passed by both the House and the Senate. The Conference Committee bill contained § 303(f)(2) as enacted. Its Report No. 2832 of August 7, 1940 took note of the exemption in the definition sections of the House bill of certain services, including towage performed by agents for regulated carriers, and said:

> "*The provisions referred to above are retained in the Conference substitute,* but for purposes of simplification and clarification they are taken out of the definitions above referred to *and are included in subsection (f) of section* 303 of the new Part III of the Interstate Commerce Act." (Emphasis added.)

Congress thus plainly sought to accomplish in § 303(f)(2) the same purpose which the House and Senate had sought to accomplish in the definition sections of their bills. That purpose is to give the tower for a certificated carrier the status of a non-carrier, and to treat his towage service as not constituting transportation within the meaning of any provision of the Act.

The words of exclusion from regulation used in § 303(b) are distinguishable from the words of exclusion used in § 303(f)(2). The former section covers a service which is

clearly "transportation" as defined in § 302, and the section exempts it; whereas the latter section removes the *service of towage* for a certificated carrier from the category of transportation as defined in § 302 and thus assures the exemption as to the tower.

The Congressional purpose is completely defeated if a barge of non-bulk freight being towed under § 303(f)(2) must be treated as if transported by the tower as a water carrier within the meaning of § 303(b).

The Supreme Court must decide whether the Commission is entitled upon such a theory to extend its jurisdiction over the transportation of bulk freight and thereby to defeat, to the disadvantage of both the shipping public and the water carrier industry which serves it, the purpose of Congress in enacting §§ 303(b) and 303(f)(2).

C. The Commission's reinterpretation of the Act would lead inevitably to further indefensible extensions of its jurisdiction.

A decision upholding the Commission would lead to an even greater extension of Commission jurisdiction than may be apparent from the circumstances of this case. In interpreting § 303 (b) the Commission has in effect held that the § 303(b) exemption is destroyed whenever any commodities in addition to three bulk commodities are found in a tow—regardless of any other provisions of the Act, regardless of the nature of the additional commodities in the tow and regardless of the relationship of the tower to such additional commodities. Counting the commodities provides the sole test.

For example, given any tow of three bulk commodities —one barge of salt, one of sulphur, and one of ore:

—if a carrier sought to combine in the same tow any *private carriage*, the § 303(b) exemption would be

destroyed. This would follow under the rationale of the Commission's decision even though private carriage is clearly exempt from all provisions of the Act. [49 U.S.C. § 902, (c), (d), (e)]. The logic of the Commission's theory would lead to this result even if the added barge contained the carrier's own equipment and supplies.

—if any *intrastate* transportation were performed by the carrier in the same tow, the § 303(b) exemption would be similarly destroyed, even though the Act is categorically stated to have no application to such intrastate transportation [49 U.S.C. §§ 902 (c), (d); 903 (j) and 903 (k)], and even though any attempt to impose regulation of the character here involved, when conditioned on the performance of intrastate transportation, would seem to be beyond the constitutional power of the Congress.

—if there were included in that tow *liquid cargo* in bulk in a barge which met the specification of § 303(d),[5] the § 303(b) exemption would also be wiped out, even though the transportation of such liquid cargoes is separately exempt under § 303(d) of the Act [49 U.S.C. § 903 (d)].

The Commission's analysis of § 303(b) relies blindly on a simple count of all commodities physically present in a given tow. Its fatal defect is its complete disregard of

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[5] §303(d) [49 U.S.C. § 903 (d)]:

(d) Nothing in this chapter shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Commandant of the Coast Guard pursuant to the provisions of section 391a of Title 46.

the policy of the Act and of the express instructions which are contained in its other sections as to services and commodity movements which were to be left free from regulation.[6]

II.

A. The Commission's reinterpretation effectively destroys the towage exemption in §303(f)(2) in the only situation where it has practical value.

The question presented by the Commission's attempted redefinition of its jurisdiction is particularly serious since the Commission interpretation of § 303(b) in effect reads § 303(f)(2) out of the Act.

The § 303(f)(2) exemption can have practical value *only* in the case of towage by a non-certificated carrier who is also handling § 303(b) exempt freight of his own in the same tow. When the towing agent is certificated, there is of course no need for a § 303(f)(2) exemption to permit lawful performance. And when a carrier without a certificate wants to devote its towboat only, there being no accompanying tow, to the service of towing non-bulk freight for a certificated carrier, it need not enter into a towage agreement but can easily do so by a charter without using the § 303(f)(2) exemption. The charterer of a towboat to a carrier is, by definition, not a carrier subject to the Act [49 U.S.C. § 903(e)][7] Furthermore, non-certificated

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[6] House Committee Report No. 1217 (Seventy-sixth Congress) submitted on July 18, 1939, after taking note of the exemption of bulk transportation in §303(b), stated:

> These exemptions are written in terms of the transportation engaged in, so that any other transportation which the carriers may engage in will be subject to such regulation as may be provided for.

[7] See second sentence in §303(e) quoted in footnote 3 on pages 10, 11 above.

carriers rarely if ever will devote their towboats alone to towing non-bulk freight, since such carrier's principal business is the transportation of bulk freight for shippers. See pp. 4, 8, *supra*.

The Commission's interpretation of § 303(b) therefore acts as an absolute bar to the only type of towing arrangements which have any rational need for the § 303 (f) (2) exemption. While paying lip service to § 303 (f)(2) in its opinion, the Commission has destroyed its effectiveness and necessarily defeated the purpose of Congress in enacting it. It has thereby reversed the consistent pattern of permissible towage operations which has been followed since the passage of Part III of the Act.

As Commissioner Arpaia stated in his dissent (Appendix B, p. 43 herein):

> "Indeed, the purposes of section 303(f)(2) would be seriously impaired if the use of that exemption precluded reliance by the user [on] the section 303(b) exemption . . . .
>
> "The result would be to severely restrict the service of incidental towage and would produce wasteful transportation. * * * The practical effect of such interpretation would be therefore to limit the performance of incidental towage—a result directly in conflict with the purpose of section 303(f)(2)."

Moreover, the inherent contradiction in the Commission's own opinion shows the illogic of the result reached. The Commission opined that towage of non-bulk freight is exempt from regulation under § 303(f)(2) even when in the same tow with bulk commodities being transported by the tower for shippers. In the next breath, however, the Commission opined that there was no exemption as to the transportation of the bulk freight under those circum-

stances—solely on the ground that the § 303(b) exemption as to the carrier's "transportation" of the bulk commodities was destroyed by its act of simultaneously engaging in § 303(f)(2) exempt towage. The Commission thereby made ineffectual and of no practical importance what it had just finished defending: the exempt status of the § 303(f)(2) tower in the stated circumstances.

It may not be assumed that a statute at one and the same time expressly confers a right and yet specifically destroys it. Rather, every statute should, if possible, be interpreted so as to harmonize and give effect to all of its parts. *East Tennessee V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U.S. 1 (1900). The net effect of the Commission's reinterpretation of the Act, however, is to apply § 303(b) in such a way as to deprive § 302(f)(2) of any practical meaning or effect.

B. The Commission's reinterpretation adversely affects efficiency and economy in transportation which the regulatory system adopted by the Congress sought to preserve.

A principal objective of the National Transportation Policy (49 U.S.C., paragraph preceding § 1; 54 Stat. 899) is to secure efficiency and economy in transportation. The attainment of that objective was promoted by the Commission's 1944 ruling.[8] That ruling increased the supply of towage available for certificated carriers. As a result, their barges loaded with non-bulk freight could be moved

[8] The towage exemption was enacted to preserve "flexibility" as one of the "virtues of water transportation" and to make unnecessary "two [authorized and regulated] common carriers" in the performance of a single service for a shipper. 84 Cong. Rec. 9985-86, 10112-13.

more frequently and more expeditiously than if they had to wait for a towboat operated by a certificated carrier. This meant better service to shippers at a lesser cost to the carrier. At the same time the transportation of the non-bulk freight was fully regulated in the name of the certificated carrier for whom the towage was performed. The purposes of the Act were being carried out.

The Commission's 1957 reversal of its 1944 ruling is directly opposed to the objective of efficiency and economy in transportation. The effect of this reversal is to make it impossible, as a practical matter, for certificated carriers to augment their power requirements in transporting non-bulk freight by obtaining towage under § 303(f)(2) from non-certificated carriers. This is so because the principal business of the non-certificated carrier is the transportation for shippers of bulk freight, such as minerals and grains, under the § 303(b) exemption.

If, as the Commission holds, a non-certificated carrier can perform § 303(f)(2) towage *only* if its towboat is being devoted to no other service, such towage could not be performed unless the non-certificated carrier were willing to forego its principal business. Rarely, if ever, would that be worthwhile even for a single voyage.

The result would be that certificated carriers with less than full loads or with no readily available towboats would be faced with needless delay and expense. This might be particularly hard on the smaller carriers.

The practical effect of the Commission's interpretation is not disputed, even by those who support that interpretation. The brief to the Commission for the intervening appellees, Mississippi Valley Barge Line Company and John I. Hay Company, both certificated water carriers, which is a part of the record here, concedes that the interpretation which the Commission adopted upon their urg-

ing will cause "hardship insofar as towage by unregulated for regulated carriers is concerned."

Moreover, the non-regulated segment of the water carrier industry, which comprises a most important part of the national transportation system, is deprived by the Commission's attempted redefinition of its jurisdiction of an opportunity to do legitimate work as agents for regulated carriers to the advantage and profit of both.

As a direct result of the assailed interpretation, the over-all costs of water carrier services as a whole are increased, while service to shippers is impaired.

The Supreme Court's disposition of the question presented will therefore vitally affect the well-being of all segments of the water carrier industry, as well as the interest which the shipping public has in good service at the lowest possible cost.

CONCLUSION.

For the reasons herein set forth, appellants respectfully urge that the question submitted is substantial and of general public importance and that the Supreme Court should have the benefit of oral argument and briefs on the merits.

Respectfully submitted,

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APPENDIX A

COMMERCIAL BARGE LINES, INC., American Commercial Barge Line Company, and Commercial Transport Corporation,
Plaintiffs,

vs.

UNITED STATES of America, and Interstate Commerce Commission,

Defendants.

Civ. A. No. 17142.
United States District Court
E. D. Michigan, S. D.
Aug. 21, 1958.

Before SIMONS, Chief Judge, Court of Appeals for the Sixth Circuit, and THORNTON and O'SULLIVAN, District Judges.

THORNTON, District Judge.

A statutory three-judge court was convened pursuant to the complaint filed herein which reads as follows:

"I.

"This is a civil action brought to restrain, annul, enjoin and set aside a report and order of the Interstate Commerce Commission, hereinafter termed 'Commission', entered on March 20, 1957, in a proceeding entitled *Commercial Transport Corporation—Exemption, Section* 303(b) *and* 303(f) (2), *I.C.C. Docket No.* 32033, reported in 300 I.C.C. 66.

"II.

"(a) Plaintiff, Commercial Barge Lines, Inc., hereinafter termed 'Commercial', is a corporation organized and existing under the laws of the State of Indiana, with its principal office at Detroit, Michigan. Said Plaintiff is a common carrier by water engaged in the transportation in interstate and foreign commerce

of new automobiles and related commodities on the Mississippi, Ohio, and Tennessee Rivers, and on the Gulf Intra-Coastal Canal, under a certificate of public convenience and necessity issued by the Commission pursuant to Part III of the Interstate Commerce Act, as amended (49 U.S.C. sec. 901, *et seq.*).

"(b) Plaintiff, American Commercial Barge Line Company, hereinafter termed 'American Commercial', is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Jeffersonville, Indiana. Said plaintiff, subsequent to the merger into it of American Barge Line Company on August 1, 1957 pursuant to authority granted by the Commission in its report and order of June 4, 1957, in Docket No. MC-F-6331, is and has been a common carrier by water engaged in the transportation in interstate and foreign commerce, of general commodities on the Mississippi, Ohio and Tennessee Rivers, under a certificate of public convenience and necessity, issued by the Commission pursuant to Part III of the Interstate Commerce Act, as amended (49 U.S.C. sec. 901, *et seq.*). Prior to August 1, 1957, the corporate name of said plaintiff was Commercial Transport Corporation, hereinafter termed 'Old Transport', and plaintiff then engaged in the interstate transportation by water of various dry and liquid commodities in bulk on the Mississippi, Ohio, and Tennessee Rivers, and the Gulf Intra-Coastal Canal, without a certificate from the Interstate Commerce Commission under the exemptions provided in sections 303(b) and 303(d) of the Interstate Commerce Act, as amended (49 U.S.C. sections 903(b) and 903(d)), and, under the exception provided in section 303(f) (2) of said Act (49 U.S.C. sec. 903(f) (2)), it also performed towage for other carriers by water of freight moving under regulation provided by Part III of said Act of such other carriers.

"(c) Plaintiff, Commercial Transport Corporation, hereinafter termed 'New Transport', is a corporation organized on July 31, 1957, and existing under the laws of the State of Delaware with its principal office

at Houston, Texas. Said plaintiff is a wholly-owned subsidiary of American Commercial. It holds no certificate or permit under Part III of the Interstate Commerce Act, as amended. On and after August 1, 1957, said plaintiff has owned and operated the facilities formerly owned and operated by Old Transport and has engaged in the business of a carrier by water exempt from regulation similar to the business exempt from regulation carried on by Old Transport prior to August 1, 1957, as described in subparagraph (b) immediately above.

"III.

"This complaint is brought, the United States of America is made a defendant, and the jurisdiction of this Court is conferred, pursuant to sections 1336, 1398, 2284 and 2321-2325 of Title 28 of the United States Code, section 1009 of Title 5 of the United States Code, and section 17 (9) of the Interstate Commerce Act, as amended (49 U.S.C. sec. 17(9)). The Commission is made a defendant as a party in interest.

"IV.

"(a) Carriers, including the plaintiffs, which operate on the rivers and waterways mentioned in Paragraph II above, generally perform transportation by means of non-self-propelled vessels (barges) with the use of separate towing vessels (tow-boats).

"(b) Water carriers without common carrier certificates or contract carrier permits issued by the Commission under Part III of the Interstate Commerce Act, as amended (49 U.S.C. sec. 901, *et seq.*), hereinafter referred to as 'unregulated carriers', may lawfully engage only in services which are exempted from regulation by said Act. Services in interstate and foreign commerce so exempted include, among others, (1) under section 303(b) of said Act, transportation for shippers of not more than three commodities in bulk in one tow (one or more barges handled as a unit), such a tow being hereinafter termed a 'solid bulk tow'),

and (2) under section 303(f)(2) of said Act, the towing for another water carrier of a barge loaded with non-bulk freight when said barge is moving subject to Part III of said Act on the bill of lading and within the limits of the certificate or a permit of such other water carrier, said service being hereinafter termed 'towage'.

"(c) A tow in which a water carrier performs towage and, in addition, transports for shippers in its own name three or less commodities in bulk, which tow would be a solid bulk tow if the barge of non-bulk freight being towed were not included therein, is hereafter termed a 'mixed tow'.

"(d) In 1944, representatives of certain water carriers through correspondence with the Commission, true and correct copies of the letters comprising said correspondence being attached hereto as Exhibit A, asked the Commission to rule on the question of whether the operation by an unregulated carrier of such a mixed tow made inapplicable the section 303(b) exemption as to the bulk commodities transported therein and subjected the transportation of said bulk commodities to Part III of the Interstate Commerce Act.

"(e) In a letter dated March 27, 1944, written by John F. Girault, Assistant Director, Bureau of Water Carriers and Freight Forwarders, at the direction of Commission, Division 4, it was ruled that the section 303(b) exemption does embrace the transportation of bulk commodities included in such a mixed tow and that such transportation of bulk commodities is not made subject to the Act by the addition to the tow of the barge of non-bulk freight being towed therein. A true and correct copy of said letter is attached hereto as Exhibit B.

"V.

"For many years after 1944, many regulated carriers by water in reliance on said ruling secured towage from unregulated carriers, which towage was per-

formed by such unregulated carriers in mixed tows. The Towage which was secured by Commercial from Old Transport was so performed in reliance on said ruling. Early in 1956, in protests filed in opposition to the proposed merger of American Barge Line Company into Old Transport and the proposed transfer of the facilities and business of Old Transport to New Transport if that merger were approved and consummated, that transaction being the subject matter involved in Docket No. MC-F-6331, protesting interests urged that the operation of a mixed tow as above defined and as then operated by Old Transport was unlawful. To remove uncertainty as to that matter, Commercial and Old Transport by joint petition filed August 15, 1956, requested the Commission to institute an appropriate proceeding for the purpose of issuing a declaratory order under the provisions of section 5(d) of the Administrative Procedure Act (5 U.S.C. sec. 1004(d)) as to the construction and application of the exemptions from regulation provided in section 303(b) and 303(f)(2) of the Interstate Commerce Act, as amended, to the services rendered in the operation in interstate and foreign commerce of a mixed tow as defined in paragraph IV(c) hereof. A true and correct copy of said petition is attached hereto as Exhibit C.

"VI.

"By order of September 28, 1956, a true and correct copy of which is attached hereto as Exhibit D, the Commission, Commissioner Mitchell, instituted the investigation requested by said petition.

"VII.

"Thereafter, the plaintiffs and other parties filed briefs, affidavits or representations which contained data, views and argument addressed to the questions stated in said order of the Commission instituting the investigation. On March 20, 1957, the Commission, Division 4, issued its report and order in said investigation, which is the report and order sought to be en-

joined. A true and correct copy of said report is attached hereto as Exhibit E, and a true and correct copy of said order is attached hereto as Exhibit F. In and by said report and order the Commission, Division 4, reversed the ruling announced in 1944 and held that the operation of a mixed tow as described in paragraph IV(c) hereof makes subject to regulation the transportation of the bulk commodities included in such a mixed tow.

"VIII.

"On or about April 22, 1957, Commercial and Old Transport petitioned the Commission for reconsideration with respect to the order of Division 2 of March 20, 1957. The Commission denied said petition by order of June 17, 1957, a true and correct copy of said order being attached hereto as Exhibit G.

"IX.

"(a) Observance of the rule announced in the report and order sought to be enjoined will limit and handicap the plaintiffs, Commercial and American Commercial, with respect to the towboats available for hire by them for the purpose of towing their barges loaded with non-bulk commodities since a towboat operated by an unregulated carrier cannot be hired for any voyage if said towboat on the same voyage and in the same tow is handling a solid bulk tow as above defined, and said plaintiffs will be injured thereby.

"(b) Observance of the rule announced in said report and order will limit and handicap the plaintiff, New Transport, in the operation and use of its towboats since it will be unable to devote such towboats to the performance of towage on any voyage in which said towboats are engaged in the transportation for shippers of any bulk commodity in the same tow, and said plaintiff will be injured thereby.

"(c) If plaintiffs fail to observe the rule announced in said report and order, they thereby subject themselves to the risks of criminal prosecution.

"X.

"The report and order of the Commission attached hereto as Exhibits E and F are arbitrary, unlawful, and beyond the power of the Commission to enter because said report and order rest on a misconstruction and an erroneous application of sections 303(b) and 303(f)(2) of Part III of the Interstate Commerce Act and deprive the plaintiffs of rights with respect to their operations and the use of their facilities granted to them by the Interstate Commerce Act, as amended.

"By reason of the arbitrary and unlawful acts of the Commission with respect to the ruling in its report and order of March 20, 1956, plaintiffs are left without adequate remedy at law and will be irreparably damaged if the relief hereinafter prayed is not granted.

"Wherefore, plaintiff prays:

"1) That, pursuant to the statutes referred to in paragraph II hereof, there shall be constituted to hear this case a special Court of three Judges, one of whom shall be a Circuit Judge.

"2) That process issue against defendants, United States of America and Interstate Commerce Commission.

"3) That, upon final hearing of this action, the Court adjudge that the report and order of the Commission are unlawful, beyond the power of the Commission, arbitrary, and based upon a misconstruction and erroneous application of the Interstate Commerce Act, as amended, and that a decree be entered setting aside, annulling, suspending and perpetually enjoining the enforcement of the rule announced in said report and order, and that plaintiffs have such other and further relief as the Court may deem proper in the premises."

Insofar as here pertinent, Section 303(f)(2) [49 U.S.C.A. 903(f)(2)] reads as follows:

"Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply— * * *

"(2) to transportation by water by any person (whether as agent or under a contractual arrangement) for * * * a water carrier subject to this part, in the performance * * * of towage; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by * * * water to which such services are incidental."

Section 303(b) [49 U.S.C.A. 903(b)] provides:

"Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities * * * For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel * * * "

The finding of the Interstate Commerce Commission was as follows:

"We find that the transportation of commodities in bulk in a unit with nonbulk commodities is not transportation exempt from regulation under the provisions of section 303(b) of the act; and we further find that incidental towage performed for other carriers subject to the act is exempt from regulation under the provisions of section 303(f)(2) where a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities, and that this finding would be the same irrespective of whether or not there is a relationship, corporate or otherwise, between the tower and other carriers. An order will be entered discontinuing the proceeding." 300 I.C.C. 71.

Plaintiffs argue that because the nonbulk part of such unit of transportation is exempted under section 303(f)(2), its presence in the unit should be disregarded in deter-

mining whether the balance of the unit (bulk) qualifies for exemption under 303(b).

In their briefs and on oral argument, plaintiffs suggest that there is a conflict between 303(f)(2) and 303(b); that once a carrier is exempted from regulation by virtue of 303(f)(2) it becomes, in effect, insulated or immunized from the operation of 303(b). The Interstate Commerce Commission concluded as a matter of law that plaintiffs' contention as to the proper construction of 303(b), when read together with 303(f)(2), is not sound. The Commission construed 303(b) adversely to the plaintiffs, and we are unable to set aside its report and order because we believe that its legal conclusion was not erroneous.

Plaintiffs' briefs review the legislative history of the statutes involved, and urge upon us the necessity of construing these two sections to give what they call harmonious effect to both. We find no necessity for reviewing either legislative history or previously adjudicated cases, because we find the language of each section clear and not in conflict. The Supreme Court in *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 277-278, 49 S.Ct. 133, 136, 73 L.Ed. 322 enunciates the principle which guides us here:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that, where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation * * * Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure, and other like extraneous matter may be taken into consideration to aid in the ascertainment

of the true legislative intent. But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

[1, 2] We find no ambiguity in the plain, easily readable language of 303(b). It seems obvious that by the enaction of 303(b), Congress intended to provide an exemption for a water carrier transporting commodities in bulk where no more than 3 bulk commodities are being transported * * * "not more than three such commodities" is the test, nothing more, nothing less. Either a prospective exemptee meets the test or does not. It is that simple. If there is any doubt in the mind of one reading the first part of the section, such doubt becomes resolved when one reaches this sentence: " * * * For the purposes of this subsection two or more vessels while navigated as a unit shall be considered a single vessel * * * " Section 303(b) is providing an exemption from regulation of a vessel (stated as including 2 or more vessels being navigated as a unit) where no more than 3 bulk commodities are being carried. This means that the unit must be considered in its entirety in order to appraise the impact of 303(b) on it. The test is laid down in 303(b), and that is all that is necessary. The makeup of the cargo is determinative as to 303(b). If the physical makeup of the "vessel" does not come within the 303(b) exemption, then how can plaintiffs seriously claim its benefit? As to 303(f)(2) an exemption is provided where simple towage is involved. The 303(f)(2) exemption has application to the particular situation outlined therein. No complicated theorizing is necessary to explain that which is apparent.

An appropriate order or orders may be presented.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 32033

COMMERCIAL TRANSPORT CORPORATION—EXEMPTION SECTION 303(b), AND 303(f)(2)

Decided March 20, 1957

1. Found that the transportation of commodities in bulk in a unit with nonbulk commodities is not transportation exempt from regulation under the provisions of section 303(b) of the Interstate Commerce Act.
2. Found that where a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities, such towage, if performed for other carriers subject to the act, is exempt under the provisions of section 303(f)(2) of the act. Proceeding discontinued.

Kenneth J. McAuliffe, Samuel H. Moerman, Harold E. Spencer, Richard J. Hardy, and *Nuel D. Belnap* for petitioners.

Robert J. Bernard, J. D. Feeney, Robert F. Munsell, F. X. Masterson, James W. Nisbet, Kenneth Potter and *Ed White* for railroad repliants.

Arthur J. Brosius, John S. Mason, R. Granville Curry, Frederick M. Dolan, Harry C. Ames, Donald Macleay, and *Russell S. Bernhard,* for water-carrier repliants.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, ARPAIA, AND WINCHELL BY DIVISION 4:

By joint petition filed August 15, 1956, Commercial Barge Lines, Inc., and Commercial Transport Corporation, hereinafter called Commercial Barge and Commercial Transport, respectively, seek a declaratory order under the provisions of section 5(d) of the Administrative Procedure Act to remove uncertainty as to the construction and application in certain circumstances, of the exemptions from regulation as provided in sections 303(b) and 303 (f)(2) of the Interstate Commerce Act. Replies were filed by certain railroads and water carriers.

In accordance with the procedure prescribed by appropriate orders, briefs and reply briefs were filed by petitioners in support of their position, and by Union Barge Line Corporation, John I. Hay Company, Mississippi Valley Barge Line Company, Coyle Lines Incorporated, and Dixie Carriers, Inc., and by Class I rail carriers in Southern (except the Chesapeake and Ohio Railway Company and the Nashville, Chattanooga and St. Louis Railway Company), Western trunk line, and Southwestern freight bureau territories, and by Eastern territory railroads, hereinafter called repliants, in opposition to petitioners' position. Permission to file certain affidavits was also granted.

The questions follow:

A. If to an otherwise solid tow of dry-bulk commodities, being transported by the operator of the tow for shippers, there is added a barge of nonbulk commodities to be handled by the tower under conditions which would make such a barge exempt as to the tower under section 303(f)(2) if handled separately, does

such inclusion have the effect of making inapplicable either the exemption under section 303(b) of the commodities in bulk or the exemption as to the tower under section 303(f)(2) of the barge containing the nonbulk commodities?

B. Is the legal rule in the factual situation just stated the same or different when the tower is a subsidiary corporation of, or a corporation affiliated with, the carrier for whom the towage of the nonbulk commodities is performed, as when the tower has no relationship, corporate or otherwise, to such carrier?

Commercial Barge is a wholly-owned subsidiary of Commercial Transport and holds a certificate in No. W-751, *et al.*, authorizing it, so far as here pertinent, to operate as a common carrier by water with barges and towboats in the transportation of motor vehicles and specified related articles between points and ports along the Illinois Waterway, and the Mississippi, Missouri, Ohio, and Tennessee Rivers and the Gulf-Intracoastal Waterway. Commercial Transport engages in the transportation of commodities in bulk and holds no operating authority from the Commission. In conducting these operations Commercial Transport succeeded Commercial Petroleum and Transport Company which, in turn, succeeded Butcher-Arthur, Inc. In 1949 the latter company acquired the entire capital stock of Commercial Barge. As a result of the various transactions Commercial Barge became a wholly-owned subsidiary of Commercial Transport. Butcher-Arthur and Commercial Petroleum held no operating authorities from the Commission. Their carrier-for-hire operations, like those of Commercial Transport, consisted of transportation of commodities in bulk and were claimed to be exempt from regulation under the provisions of sections 303(b) and (d) of the act.

On occasions, Commercial Transport is employed by Commercial Barge to tow barges carrying automobiles as to which Commercial Barge is the regulated carrier and the latter has issued bills of lading to shippers. Such towage is sometimes performed from the origin to destination shown in the bills of lading, and at other times, for only a part of the journey. In the performance of such towage, the barges loaded with automobiles, on occasion, are added to southbound tows carrying dry-bulk commodities, not exceeding three in number, being transported by Commercial Transport for shippers under its own contracts of affreightment. Similar towing services for Commercial Barge were performed by Butcher-Arthur, Inc., and Commercial Petroleum prior to the successive acquisition of those carriers by Commercial Transport.

Petitioners have conducted the operations as above-described for many years in the supposition that the towing of bargeloads of automobiles by the parent company is exempt as to the tower within the meaning of section 303(f)(2), and that the transportation by Commercial Transport of dry-bulk commodities for account of shippers in the same tow is exempt under the provisions of section 303(b). This belief is based upon a letter, dated March 27, 1944, by the then assistant director of the Commission's Bureau of Water Carriers and Freight Forwarders at the direction of the Commission, division 4, to an attorney who represented a water carrier engaged in bulk transportation. Therein the view was expressed "that if to an otherwise solid tow of coal or any other commodities in bulk coming within the exemption provided in section 303(b), there were to be added a barge of package freight to be handled by the tower under conditions which would make it exempt under section 303(f)(2), if handled separately, such inclusion would not destroy the exemption under section 303(b) as to the commodities in bulk, or under section 303(f)(2) as to the package freight."

The genesis of the instant petition is a plan of operation which is to be instituted upon the consummation of a merger and other matters which are the subject of a proceeding docketed as No. MC-F-6331, *Commercial Transport Corporation—Merger—American Barge Line Co.* Therein approval is sought of a transaction whereby Commercial Transport would place all of its physical assets now used in the performance of incidental towage and transportation of commodities in bulk into a new subsidiary also to be known as Commercial Transport Corporation, and would itself become American Commercial Barge Line Company, hereinafter called American Commercial. The latter would acquire all of the assets and franchises of American Barge Line Company, hereinafter called American, a certificated water carrier authorized to operate on the Mississippi River and certain tributaries, and stock control of Blaske, Inc., also a certificated water carrier authorized to operate on the Illinois Waterway and the upper Mississippi River. If the merger is approved and consummated, the common carrier operations subject to regulation now conducted by American would be transferred to American Commercial, and the transportation of bulk commodities presently performed by Commercial Transport would be continued by a new subsidiary of the same name. In addition, American Commercial and Commercial Barge intend to use the services of the new subsidiary in the performance of incidental towage. In this connection, if it is found in the instant proceeding that incidental towage of barges loaded with nonbulk commodities may be performed in mixed tows with dry-bulk commodities without destroying the respective exemptions, the new subsidiary proposes to include barges of nonbulk commodities moving under bills of lading of Commercial Barge and American Commercial in its tows transporting commodities in bulk.

Section 303(b) provides:

> Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. * * * For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. * * *

Section 303(f)(2) provides that notwithstanding any provision of this section or of section 302, the provisions of part III of the act shall not apply—

> (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a * * * water carrier subject to this part, in the performance of * * * towage; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by * * * water to which such services are incidental.

None of the parties dispute the meaning of section 303(f)(2) in so far as the questions here presented are concerned. It is clear that when a towing service is performed by a person for a water carrier which is engaged in barge transportation subject to regulation under part III of the act, that the intention of Congress was not to subject to separate and additional regulation the person performing the incidental towing service. Such towage is subject to regulation as part of the transportation performed by the barge carrier. See *Union Barge Line Corp. Applications,* 250 I.C.C. 689, and *United States Lighterage Corp. Contr. Car. Application,* 250 I.C.C. 347. Nor is the exemption provided by section 303(f)(2) destroyed if the towing carrier is a subsidiary of the barge carrier, such as would be the case if the merger proposed in No. MC-F-6331 is consummated, or when the towing carrier is the

parent corporation of the barge carrier such as the present relationship between Commercial Transport and Commercial Barge. See *Card Towing Line, Inc., Contract Carrier Application*, 250 I.C.C. 621. The sole issue, therefore, is the proper application of section 303(b) to the facts as set forth in question "A".

Petitioners contend that the ruling of March 27, 1944, is proper, and that the exemption provided in section 303(b) applies to the transportation of bulk commodities when transported under the circumstances stated in question "A". They insist that such construction has not defeated any regulatory purpose, but permits a practice of long standing among barge carriers which contributes to economy and efficiency of operation. They assert that a review of the legislative history of section 303(b) clearly indicates that bulk transportation was excluded from regulation because such transportation by water was considered by Congress to be so inexpensive as to render other modes of transportation non-competitive therewith. Petitioners argue that barges of freight which are regulated as to the bill-of-lading carrier should be "laid aside", in the circumstances presented, in determining the applicability of section 303(b) to the transportation of bulk commodities by the carrier performing the incidental towage. In other words, we are asked to disregard the contents of the barges towed for other carriers. They insist that the words "transportation" and "transported" appearing in the first sentence of section 303(b) qualify the term "commodities in bulk" and that the qualifying phrase "is being used for the carrying of not more than three such commodities," refers to solely bulk commodities in the vessel or tow. It follows, they assert, that the physical act of towing barges of nonbulk commodities is the act of an agent for the bill-of-lading carrier, and is not em-

braced in the term "carrying", because the carriage of such commodities is being performed by the latter carrier, and not by the tower. In that case, petitioners insist that the towed barges cannot be considered as carried within the meaning of section 303(b).

Petitioners further assert that in the legislative history of section 303(b) there is no suggestion of a Congressional intent to limit the application of any exemptions so that the performance of two functions, either one of which would be exempt if performed separately, would not be exempt if performed together. In this connection, they state that the purpose of section 303(f)(2) would be seriously impaired if the performance of incidental towage of nonbulk commodities would result in subjecting the tower to regulation in the performance of transportation which would otherwise be exempt under section 303(b). The practical effect of such interpretation, say petitioners, would be to limit the performance of incidental towage almost entirely to regulated carriers, a result which they assert, is not warranted by the purposes of section 303.

Repliants are certificated barge and towboat carriers which operate along the Mississippi River and its tributaries, and the Gulf-Intracoastal Waterway, and railroads which serve the territories tributary to these waterways. They argue that the ruling of March 27, 1944, should be reversed. Otherwise the water-carrier industry would be faced with an expansion of exempt operations, and a breakdown of regulated transportation on the inland waterways. It is their position that the admixture of nonbulk commodities and bulk commodities in a single tow makes the provisions of section 303(b) inapplicable, and consequently the bulk commodities in such tow become subject to regulation.

Although the ruling of March 27, 1944, hereinbefore mentioned, supports petitioners' views, that ruling was, in effect, reversed by the decision of the Commission, division 4, in *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796. In the cited decision division 4, said:

> • • • Carrier B cannot serve both as agent for exempt transportation of the commodities in bulk and as principal in the transportation in the same unit, of other regulated commodities. The statutory exemption of the transportation by water of commodities in bulk was found not to apply when nonexempt commodities and bulk commodities, although in separate vessels, are moved in tows as a unit, in *Portland Tug & Barge Co., Ext.—Washington—California*, 265 I.C.C. 325, 335; *Mulqueen Contract Carrier Application*, 250 I.C.C. 436, 439; and *Jacob Rice & Sons Contract Carrier Application*, 250 I.C.C. 727, 729 by division 4. To permit the merger or joint operation of the movement under the facts submitted and at the same time preserve the status of unregulated transportation service by the connecting carrier transporting both the bulk and nonbulk commodities in vessels navigated as a unit, would have the effect of applying the exemption provisions of section 303(b) of the act to transportation clearly not embraced thereby.

We believe it is clear that nonbulk commodities cannot be included in a tow of bulk commodities without subjecting the entire cargo to regulation regardless of how the responsibility to shippers under bills of lading may be divided among two or more carriers. A study of the legislative history of section 303(b) leaves no doubt that Congress intended to exempt the transportation of commodities in bulk, but it is likewise clear that it intended to limit such exemption, and we have consistently so found. In view of our conclusions hereinbefore stated, it is not necessary to consider further the questions in so far as they concern the corporate relations of the petitioners.

We find that the transportation of commodities in bulk in a unit with nonbulk commodities is not transportation exempt from regulation under the provisions of section 303(b) of the act; and we further find that incidental towage performed for other carriers subject to the act is exempt from regulation under the provisions of section 303(f)(2) where a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities, and that this finding would be the same irrespective of whether or not there is a relationship, corporate or otherwise, between the tower and other carriers. An order will be entered discontinuing the proceeding.

ARPAIA, *Commissioner,* dissenting:

I do not agree with the interpretation made by the majority with respect to the bulk commodity exemption.

It was clearly the intent of Congress, as expressed in section 303(f)(2), to exempt from the provisions of Part III incidental towage performed by any person for another carrier and, as expressed in section 303(b), to likewise exempt the transportation of bulk commodities when not more than three such commodities are transported in a single unit.

When the towing of non-bulk commodities and the transportation of bulk commodities are performed *separately* there can be no question but that such operations are exempt under section 303(f)(2) and 303(b), respectively. The majority holds, however, when such operations are being performed simultaneously that the towage of the nonbulk commodities destroys the exemption as to the transporta-

tion of the bulk commodities. There is nothing in the legislative history of either section which would suggest an intent to condition the application of either exemption upon the use of but one exemption at any given time by the carrier claiming the exemption. Indeed, the purposes of section 303(f)(2), would be seriously impaired if the use of that exemption precluded reliance by the user of the section 303(b) exemption. That is to say, if a carrier performing incidental towage of nonbulk commodities thereby forfeits the section 303(b) exemption, he must either possess a certificate and move his own bulk traffic under regulation when performing incidental towage for another carrier, or he must limit the particular operation exclusively to the performance of incidental towage.

The result would be to severely restrict the service of incidental towage and would produce wasteful transportation. An unregulated carrier would not want his barge-load included in the tow with other carriers' barges not subject to the exemption, because it would thereby lose its exemption. The practical effect of such interpretation would be therefore to limit the performance of incidental towage—a result directly in conflict with the purposes of section 303(f)(2).

I would find that the addition to a tow of bulk commodities, transported within the exemption of section 303(b) of the act, of a barge or barges of non-bulk commodities to be handled by the tower under conditions which would make it exempt under section 303(f)(2) if handled separately, would not destroy the exemption provided by section 303(b) merely because they are included in a tow with barges of nonexempt barge-loads. Although I do not believe that the exemption should be expanded, I do not believe that we are warranted in straining the clear provisions of the act by limiting it.

APPENDIX C

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 20th day of March, A. D., 1957.

No. 32033

Commercial Transport Corporation—Exemption

Section 303(b), and 303(f)(2)

Commercial Barge Lines, Inc., and Commercial Transport Corporation having filed petition for a declaratory order under section 5(d) of the Administrative Procedure Act, or an administrative ruling, on questions whether the exemptions provided by sections 303(b) and 303(f)(2) apply in stated circumstances, to which briefs and reply briefs by interested parties were permitted to be filed; and a full investigation of the matters and things having been made, said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 4.

Harold D. McCoy,
Secretary.

(SEAL)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [illegible]

[illegible]

v.

[illegible]

On Appeal From the United States District Court for the Eastern District of Michigan

MOTION OF APPELLEE CARRIERS TO AFFIRM DECISION OF DISTRICT COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 721

COMMERCIAL BARGE LINES, INC., et al., *Appellants,*

v.

UNITED STATES OF AMERICA, et al., *Appellees.*

On Appeal From the United States District Court for the Eastern District of Michigan

---

MOTION OF APPELLEE CARRIERS TO AFFIRM DECISION OF DISTRICT COURT

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the barge-line appellees, Coyle Lines Incorporated, Dixie Carriers, Inc., John I. Hay Company, Mississippi Valley Barge Line Company, and Union Barge Line Corporation, and the railroad appellees, all of which were interven-

ing defendants in the District Court, move that the judgment of that Court be affirmed.

This is a direct appeal from the final judgment entered on October 28, 1958, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 1336, 1398, 2284 and 2321-2325, dismissing appellants' complaint. The said complaint sought to set aside a declaratory order of the Interstate Commerce Commission (by Division 4) entered on March 20, 1957, in *Commercial Transport Corporation—Exemption Sections 303(b) and 303(f)(2)*, 300 I.C.C. 66, which declaratory order had been affirmed by order of the entire Commission on June 17, 1957, denying petition for reconsideration. Notice of Appeal was filed by appellants on December 22, 1958, and the Jurisdictional Statement was filed on February 19. 1959. The opinion of the District Court and the orders and opinion of the Commission are set forth in the Appendices to appellants' Statement as to Jurisdiction.

QUESTION PRESENTED

The question as presented by appellants on page 3 of their Statement as to Jurisdiction has been oversimplified to the point where it is ambiguous. A more precise statement of the question presented is the following:

> Whether the Commission, in its declaratory order of March 20, 1957, correctly ruled that the bulk commodity exemption in section 303(b) of the Interstate Commerce Act is inapplicable to a single tow of barges, which a water carrier is transporting, comprised of barges under its own bill of lading containing not more than three bulk commodities and other barges containing non-bulk

commodities being towed for a regulated carrier under the towage exemption in section 303(f)(2).

STATEMENT OF THE CASE

The three barge-line appellants in this proceeding are, in fact, a single enterprise, consisting of a parent corporation, American Commercial Barge Line Company, and two subsidiary corporations, Commercial Barge Lines, Inc., and Commercial Transport Corporation. The parent corporation and its subsidiary, Commercial Barge Lines, Inc., are certificated water carriers, whereas, the other subsidiary, Commercial Transport Corporation, is an unregulated carrier engaged in exempt transportation of bulk commodities under the exemption in section 303(b) of the Interstate Commerce Act (49 U.S.C. 903(b)). The appellants are one of the largest water carrier systems operating on the Missi. sippi River and its tributaries, and the unregulated appellant also operates on the Gulf-Intercoastal Waterway.

The appellees in this proceeding are the United States of America, the Interstate Commerce Commission, five certificated common carrier barge lines, and several railroads. The carrier appellees join in this motion. The Commission in its report and order, which is the subject of this appeal, referred to these carrier appellees in the following words (Jurisdictional Statement, page 40): "(They) are certificated barge and towboat carriers which operate along the Mississippi River and its tributaries, and the Gulf-Intercoastal Waterway, and the railroads which serve the territories tributary to these waterways."

The appellants throughout their Jurisdictional Statement make assertions giving rise to the inference

that the statutory interpretation sought by the appellants, and rejected by the Commission and the District Court, is desired by the water carrier industry generally and by the shipping public. The facts are to the contrary. Although the proceeding before the Commission was given wide publicity, including actual service of the Commission's notice instituting the proceeding, upon every certificated barge carrier operating on the aforementioned waterways, not a single water carrier, or shipper, or representative of the public or any other person joined Commercial Transport and its two affiliates in support of their contentions before the Commission or before the District Court. The appellants stand alone in urging their interpretation upon this Court, just as they were alone before the Commission and the District Court. Opposed to them are five regulated common carrier water carriers and the several railroads with whom they compete. As stated by the Commission in its Declaratory Order (Juris. Stat. p. 40), these water carriers and railroads are opposed to "an expansion of exempt operations, and a breakdown of regulated transportation on the inland waterways", which would result from a reversal of the Commission and the District Court.

This appeal is concerned with the exemption provisions appearing in sections 303(b) and 303(f)(2) of the Interstate Commerce Act, the pertinent portions of which read,

> Sec. 303(b):
>
> "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used

for the carrying of not more than three such commodities. * * * For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. * * *"

Sec. 303(f)(2):

"Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—* * * (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for * * * a water carrier subject to this part, * * * in the performance of * * * towage; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by * * * water to which such services are incidental."

Two provisions of section 303(b) require particular attention. The phrase "not more than three such (bulk) commodities" has long been construed and applied by the Commisison as an absolute limitation, in that it excludes more than three bulk commodities and all non-bulk commodities. Thus, in effect, as construed by the Commission, this phrase reads "not more than three such (bulk) commodities *and no commodities not in bulk.*" No party to this proceeding, appellant or appellee, questions the correctness of this construction.

The other provision requiring particular attention is that relating to the meaning of the term "vessel". On the Mississippi River system, the general practice of the certificated water carriers is to transport commodities, which are loaded into barges, by lashing the barges together and propelling them by means of a separate towing vessel. The lashed barges and the towing vessel together comprise what is known as a

"single tow", and are navigated as a unit. Section 303(b) expressly provides that all the barges and the towing vessel in the single tow shall be considered a "single vessel" for the purposes of the exemption in that section.

Thus, if a single tow were comprised of a towboat and several barges loaded with three bulk commodities, grain, coal, and sulphur, and nothing else, the exemption in section 303(b) would apply to such operation, and it would be unregulated. But if an additional barge, loaded with steel pipe, were to be added to that single tow, the exemption would be inapplicable to the entire tow, including the barges with the three bulk commodities, and all the barges would be required to operate subject to regulation and at tariff rates.

No party to this appeal contests the validity of the foregoing interpretation of the application of the exemption in section 303(b). The appellants, however, are endeavoring to circumvent the plain meaning and application of that exemption by combining it with the exemption in section 303(f)(2). It is appellants' objective to have sections 303(b) and 303(f)(2) so construed that the non-certificated carrier, Commercial Transport, may combine in the same vessel or tow regulated non-bulk freight moving under the bills of lading of its certificated parent corporation and unregulated bulk freight moving under its own bills of lading, and have the bulk freight excluded from regulation.

The appellants admittedly propose to navigate as a single unit barges which contain both bulk and non-bulk commodities, but at the same time they hope to preserve the exempt status of the bulk commodities

under section 303(b), notwithstanding the plain wording of that exemption to the contrary. The appellants would achieve this result by the contention that, if the unregulated carrier, Commercial Transport, were to engage in the act of towing barges of regulated nonbulk commodities for its certificated parent, under the towage exemption in section 303(f)(2), in the same tow with Commercial Transport's own barges of bulk commodities, not only would the *act of towing* its parent's barges be exempt from regulation under section 303(f)(2), but the "umbrella" of that exemption would also extend to the *physical presence* of the nonbulk commodities in the same tow with the bulk commodities. Thus, if the Commission were to examine that tow to determine whether it would be exempt under the bulk commodity exemption of section 303 (b), it would have to ignore the physical presence of the non-bulk commodities.

In response to appellants' petition for a declaratory order, and after extensive briefing by the parties, the Commission (by Division 4) issued its report and order rejecting the construction proposed by appellants and stating (300 I.C.C. 66, 71):

> "We believe it is clear that nonbulk commodities cannot be included in a tow of bulk commodities without subjecting the entire cargo to regulation regardless of how the responsibility to shippers under bills of lading may be divided among two or more carriers. A study of the legislative history of section 303(b) leaves no doubt that Congress intended to exempt the transportation of commodities in bulk, but it is likewise clear that it intended to limit such exemption, and we have consistently so found."

Appellants then requested the full Commission to reconsider the report and order by Division 4, and on June 17, 1957, the full Commission affirmed the order of the Division by denying the petition for reconsideration. Thereafter, appellants filed a complaint in the United States District Court for the Eastern District of Michigan, requesting the Court to set aside the order of the Commission. The same water carriers and railroads, who opposed appellants before the Commission, intervened in the Court action as defendants. After full briefing and oral argument, the Court unanimously sustained the Commission and dismissed the complaint, stating (Juris. Stat. p. 32):

> "We find no ambiguity in the plain, easily readable language of 303(b). It seems obvious that by the enaction of 303(b), Congress intended to provide an exemption for a water carrier transporting commodities in bulk where no more than 3 bulk commodities are being transported—'no more than three such commodities' is the test, nothing more, nothing less. Either a prospective exemptee meets the test or it does not. It is that simple. If there is any doubt in the mind of one reading the first part of the section, such doubt becomes resolved when one reaches this sentence: ' . . . For the purposes of this subsection two or more vessels while navigated as a unit shall be considered a single vessel . . .' Section 303(b) is providing an exemption from regulation of a vessel (stated as including 2 or more vessels being navigated as a unit) where no more than 3 bulk commodities are being carried. This means that the unit must be considered in its entirety in order to appraise the impact of 303(b) on it. The test is laid down in 303(b), and that is all that is necessary. The makeup of the cargo is determinative as to 303(b). If the physical makeup of the 'ves-

sel' does not come within the 303(b) exemption, then how can plaintiffs seriously claim its benefit? As to 303(f)(2) an exemption is provided where simple towage is involved. The 303(f)(2) exemption has application to the particular situation outlined therein. No complicated theorizing is necessary to explain that which is apparent."

THE QUESTIONS RAISED BY APPELLANTS ARE WITHOUT SUBSTANCE

Rule 16 of the Rules of this Court provides for receiving "a motion to affirm the judgment" of a lower Court "on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".

Appellees believe there is utter lack of such substantiality in the questions raised by appellants in the present case, for the following reasons:

(a) The Wording of Section 303(b) Is Plain and Unambiguous and Clearly Leads to the Construction Given It by the Commission and the District Court

All the arguments which appellants advance here were presented at length to Division 4 of the Commission, then to the full Commission, and then to the specially constituted three-judge District Court. Both the Commission and the District Court held the wording of section 303(b) to be completely clear on its face. The exemption applies *only* when the cargo space of the vessel or tow is being used for the purpose of transporting three or fewer bulk commodities. If it is being used in any other way, the exemption is inapplicable. If there are four bulk commodities, the exemption is inapplicable to all of them. If there are three or less commodities and a non-bulk commod-

ity is added, the exemption is inapplicable to all of them.*

In *United States* v. *Missouri Pacific RR. Co.*, 278 U.S. 269, this Court was construing the short-haul language of section 15(4) of the Interstate Commerce Act and stated (p. 277):

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

Appellees submit that the language of section 303(b) is as clear and the meaning as plain as that found in section 15(4), and nothing unreasonable results therefrom. There is no room in section 303(b) for squeezing in the exception contended for by appellants. The District Court in this proceeding aptly summarized the matter when it concluded its opinion with the statement: "No complicated theorizing is necessary to explain that which is apparent."

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* *American Barge Line Applications*, 260 I.C.C. 783, 785; *Conners Marine Co., Inc., Contract Carrier Application*, 250 I.C.C. 381, 385; *Mulqueen Contract Carrier Application*, 250 I.C.C. 436, 439; *Inland Nav. Co. Applications*, 250 I.C.C. 793, 707; *Jacob Rice & Sons Contract Carrier Application*, 250 I.C.C. 727, 729; *Central Barge Co. Applications*, 260 I.C.C. 329, 338; *Portland Tug and Barge Co., Ext.*, 265 I.C.C. 325, 335; and *American Barge Line Co. Pet. for Decl Order*, 294 I.C.C. 796, 799.

(b) The Legislative History Fully Supports the Commission's Construction of Section 303(b)

Appellants resort to legislative history in an attempt to justify their contention, but such recourse is both improper and fruitless. This Court, in the *Missouri Pacific Case,* supra, further observed (p. 278):

> "Where doubt exists and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression and meaning intended. And in such cases legislative history may not be used to support a construction that adds or takes from the significance of the words employed."

This doctrine has full application here; but if legislative history were relevant, that history clearly confirms the Commission's construction. At the time Part III of the Interstate Commerce Act was being considered by the House, Mr. Pittenger proposed an amendment to section 303(b) which would have authorized the exempt carrier transporting three bulk commodities also to transport a non-bulk commodity (automobiles) on its deck without defeating the exemption. Chairman Lea of the House Interstate and Foreign Commerce Committee vigorously and successfully opposed the proposed amendment, stating (84th Cong., Record 9982):

> "There is no reason why a bulk carrier who is entirely exempt from regulation should be permitted to destroy the service of the common carrier."

This proposed amendment was defeated, not because the exempt carirer was already being given such authority by the combined use of sections 303(b) and 303(f)(2), as appellants contend, but because Congress did not want the exempt carrier to have such authority. Thus, appellants are arguing for a construction specifically contrary to the express intent of Congress.

(c) The Commission's Construction of Section 303(b) Does Not Frustrate the Meaningful Application of the Exemption in Section 303(f)(2)

The appellants in their Jurisdictional Statement have sought to create the impression that the Commission's construction of section 303(b) in its declaratory order has impaired, if not totally destroyed, the effectiveness of the towage exemption in section 303(f)(2). The Commission has done nothing of the kind. In the last paragraph of its order the Commission expressly stated (Jurisd. Stat., p. 42):

> ". . . and we further find that incidental towage performed for other carriers subject to the act is exempt from regulation under the provisions of section 303(f)(2) where a barge or barges of non-bulk commodities are towed in the same unit with bulk commodities, . . ."

In other words, under section 303(f)(2), the unregulated subsidiary, Commercial Transport, is free to tow the barges of its regulated parent, American Commercial, without Commercial Transport itself being subject to regulation. When it does so, however, section 303(f)(2) makes it clear that the operation of the tow, although being performed by Commercial Transport, will be subject to regulation *in its entirety*.

Thus, section 303(f)(2) is concerned solely with the matter of the *legal status*, for regulatory purposes, of the two carriers involved in a towage arrangement. Section 303(f)(2) has two provisions: one providing for regulation, and the other for exemption. When a carrier issues its bill of lading to a shipper for a barge-load of freight, and then employs another carrier to tow the barge, the first provision of section 303(f)(2) provides that the bill-of-lading carrier will be subject to regulation with respect to that barge to the same extent as if it were providing the power itself; and the second provision exempts the *tower* from regulation as to such towage, so that two carriers will not both be subject to regulation for the same service. Section 303(f)(2) does no more than this.

Despite appellants' sweeping generalizations that the intended benefits of section 303(f)(2) will be destroyed by the Commission's interpretation, that section is being, and long has been, used extensively and beneficially by all forms of water carriers, entirely apart from the type of use to which appellants would put it. Certificated common carriers employ the section 303(f)(2) exemption very frequently under reciprocal towing agreements, pursuant to which they tow the barges of one another when excess capacity is available. In addition, the certificated common carriers very frequently hire independent tow boats operating under that exemption to tow their barges when the common carrier does not have sufficient tow boats of its own.

Appellants argue that the section 303(f)(2) exemption is practically worthless unless the unregulated carriers hauling exempt bulk commodities may add barges of non-bulk commodities to those tows without

destroying the section 303(b) exemption for the bulk commodity barges. Appellants completely ignore the present extensive use of that exemption by the regulated common carriers as between themselves and by independent towers in towing for the common carriers.

In this connection, appellants argue in substance that the effect of the Commission's interpretation is to accomplish what is already provided for under the leasing or charter provisions of section 302(e), and that section 303(f)(2) is superfluous under the Commission's interpretation, but this contention is wholly fallacious. The towing exemption in section 303(f)(2) if far broader than the leasing provision and permits a regulated common carrier to tow barges for another common carrier along with its own regulated barges in the same tow. This could not be done by the leasing of a tow boat. Moreover, the unregulated tow boat operators may simultaneously tow the barges of two or more common carriers in a single tow under the exemption in section 303(f)(2). This they could not do under the leasing provisions of section 302(e).

The present application of the exemption in section 303(f)(2) to regulate common carrier water transportation is both extensive and useful, despite the contrary self-serving assertions of the appellants.

(d) The Interpretation by the Commission and the District Court Conforms Completely to Other Commission and Court Decisions Interpreting the Precisely Parallel Motor Carrier Provision in Part II of the Act

The water carrier bulk commodity exemption in section 303(b) finds its precise counterpart in the motor carrier agricultural commodity exemption in section 203(b)(6) of the Act. The two exemptions are analogous both as to form and substance. Both

exempt the transportation of specific types of commodities and both impose a restriction confining the use of the conveyances to the exclusive transportation of such commodities. Thus, in section 203(b)(6) motor vehicles carrying agricultural commodities are exempt from regulation *only* "if such motor vehicles are not used in carrying any other property." Likewise, in section 303(b), water carriers transporting bulk commodities are exempt from regulation *only* "when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities".

In *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (CCA-5, 1948), an argument almost identical to that of appellants here was made. In that case the motor carrier contended that it could carry *intrastate non-agricultural* commodities on the same truck at the same time with interstate agricultural commodities without destroying the exemption in section 203(b)(6). It contended that the intrastate traffic was not subject to regulation by the Commission, and therefore could not be considered by the Commission in determining whether the truck was carrying "*only* agricultural commodities". The Court rejected this contention and applied the clear and plain meaning of section 203(b)(6), holding that the exemption applied only if *nothing* except agricultural commodities were being transported. Even though the non-agricultural commodities being transported were not subject to Commission regulation, nevertheless they defeated the exemption by being mixed with the agricultural commodities.

The Court simply looked to the *physical makeup of the cargo on the truck* in determining whether the

exemption was applicable. This is precisely what the Commission does with the section 303(b) exemption. It looks to the *physical makeup of the cargo in the barges.* If it is other than one to three bulk commodities, the exemption is inapplicable. The commission is not concerned with the bills of lading applicable to the cargo, or whether some of those bills of lading may have been issued by the tower while others were issued by a common carrier whose barges are being towed. The *Dunn Case,* supra, has been followed by the Third Circuit in a similar case, *Interstate Commerce Commission* v. *Service Trucking Co. Inc.,* 186 F. 2d 400 (CA-3, 1950). and by the Commission, *Peters Common Carrier Application,* 73 M.C.C. 331.

(c) The Interpretive Letter Upon Which Appellants Rely Is of No Significance

At page 5 of the Jurisdictional Statement, appellants refer to an interpretive letter written in 1944 by the Assistant Director of the Commission's Bureau of Water Carriers indicating that Division 4 then shared appellants' view as to the interpretation of sections 303(b) and 303(f)(2). Appellants exaggerate the significance of this letter to the point where they speak of it as an "opinion of the Commission". It was nothing of the kind. The letter was written informally. There was no adversary proceeding or notice to other water carriers. The letter was not issued by the Commission but was an informal communication from a Bureau official; and significantly, it was issued during a time of war, when transportation facilities were in extreme shortage, and when every conceivable measure was being employed to move the maximum amount of traffic.

(f) The Commission's Construction Preserves, Rather Than Impairs, the Efficiency and Economy of the Regulated Transportation System

When Congress in 1940 brought water carriers under the regulatory provisions of the Interstate Commerce Act, it recognized in the National Transportation Policy enacted at the same time (49 U.S.C., prec. sec. 1) that all segments of the *regulated* transportation industry must remain economically strong and that unfair or destructive competitive practices must be avoided. Consistent with this objective, Congress carefully defined and limited the exemptions provided in the Act, for the purpose of protecting the regulated carriers "upon their restricted routes and limited carriage" as against unjust competitive operations which might be conducted as exempt services at economic advantage. *American Trucking Assns.* v. *United States*, 344 U.S. 298, 318 (1953).

The appellants would not be standing alone today, and the carrier appellees would not have strenuously opposed appellants' contention at every stage of this proceeding, if the economy and efficiency of the regulated transportation system would be improved by appellants' suggested interpretation of the provisions of section 303(b) and 303(f)(2). *Regulated transportation is not, and never has been, improved by the extension of exemptions from regulation.* Actually, appellants desire only to improve their own unique competitive position on the rivers by combining the extensive resources and operations of the unregulated subsidiary with the far-flung operations of the regulated common carrier parent, in a way which will permit the combined operations to invade the regulated transportation field while operating under un-

regulated rates. Such a result would flow from the interpretation proposed by the appellants and could only lead to demoralization and adversity in the regulated industry.

In view of the foregoing, the carrier appellees respectfully submit that appellants present no substantial question requiring the attention of this Court and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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March 20, 1959

CERTIFICATE OF SERVICE

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March 20, 1959

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FILED
MAR 26 1959
JAMES R. BROWNING, Clerk

No. 721

In the Supreme Court of the United States

OCTOBER TERM, 1958

COMMERCIAL BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on October 27, 1958 by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing appellants' action to set aside a declaratory order issued by the Interstate Commerce Commission interpreting Sections 303(b) and 303(f)(2) of the Interstate Commerce Act (49 U.S.C. 903(b) and 903 (f)(2)).

Section 303(b) exempts from Commission regulation the transportation of bulk commodities by a water carrier for a shipper, as long as no more than three such commodities are transported in the same vessel. "Vessel" is defined to include two or more vessels "while navigated as a unit."[1] Thus, under the Act a number of barges combined in a single flotilla are deemed to constitute a single "vessel." Section 303 (f)(2) exempts from regulation "any person" who performs towage for a regulated carrier under a contract or agency arrangement; however, such towage is regulated in connection with the regulation of the carrier for which it is performed.[2]

Appellants are water carriers. The present proceedings originated in 1956 in connection with an application filed with the Commission by appellants' corporate pred-

---

[1] Section 303(b) provides in pertinent part:

> Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. * * * For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel * * *.

[2] Section 303(f)(2) provides in pertinent part:

> Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—
>
> * * * * *
>
> (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for [*inter alia*] * * * a water carrier subject to this part, * * * in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

ecessors for authority to merge under Section 5 of the Act.[3] One objective of the merger was the formation of an unregulated subsidiary corporation which, while transporting exempt bulk commodities for third persons, would, at the same time and in the same flotilla of vessels, perform towage for its regulated parent corporations. Under the plan, the subsidiary, although carying nonbulk as well as bulk commodities in the same flotilla, would preserve its 303(b) exempt status as a carrier of bulk commodities. When protestants in the merger case challenged the legality under Sections 303(b) and 303(f)(2) of the unregulated subsidiary's proposed operations, appellants initiated the present proceedings before the Commission for a declaratory order construing those sections.

After full briefing, the Commission (Division 4) held, one Commissioner dissenting, that "the transportation of commodities in bulk in a unit with nonbulk commodities is not transportation exempt from regulation" under Section 303(b) (J. St. 42). The Commission further held (*ibid.*), however, that "incidental towage performed for other carriers subject to the act is exempt from regulation" by virtue of Section 303(f)(2), even though "a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities * * *." The full Commission denied reconsideration, and the district court unanimously held that the Commission's "legal conclusion" as to Section 303(b) was "not erroneous" (*id.*, 31) and dismissed the complaint.

---

[3] The merger was authorized in June 1957 and has since been consummated. See *Commercial Transport Corporation—Control and Merger*, 70 M.C.C. 535.

ARGUMENT

Contrary to appellants' assumption (see J. St. 10-15), this case does not involve the proper scope of the towage exemption under Section 303(f)(2). The Commission specifically ruled (*id.*, 42) that the latter exemption is not lost merely because "a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities * * * ." The question presented is whether a water carrier loses its Section 303(b) exemption for the transportation of bulk commodities by including, in the "vessel" in which such commodities are carried, nonbulk commodities which it tows for others. We submit that the court below correctly affirmed the Commission's ruling that the bulk commodities exemption is forfeited if nonbulk commodities are simultaneously transported in the same flotilla.

1. As the opinion below correctly pointed out (J. St. 32), there is "no ambiguity in the plain, easily readable language of 303(b)." That section provides a narrow exemption for the "transportation by a water carrier of commodities in bulk when the cargo space of the vessel * * * is being used for the carrying of not more than three such commodities"; "vessel," in turn, is defined "as including 2 or more vessels being navigated as a unit" (*ibid.*). On its face, therefore, the exemption is available only when the carriage is limited to bulk commodities; it is inapplicable if the carrier mingles nonbulk and bulk commodities in the same flotilla.

The Transportation Act of 1940, of which Section 303(b) is a part, "was intended * * * to provide a completely integrated interstate regulatory system over * * * water carriers" (*United States* v. *Penn-*

sylvania R. Co., 323 U.S. 612, 618-619), and exemptions from such "remedial legislation" "should be narrowed and limited to effect the remedy intended" (*Piedmont & Northern Ry.* v. *Interstate Commerce Comm'n*, 286 U.S. 299, 311; *Spokane & Inland R.R.* v. *United States*, 241 U.S. 344). This rule is especially pertinent here, since, as stated in connection with a predecessor bill, Congress gave "[v]ery painstaking consideration * * * to the working out of these exemptions," including Section 303(b), "to insure that the exemptions would not result in regulated carriers being subjected to unfair competitive disadvantages" (H. Rep. 1217, 76th Cong., 1st Sess., p. 20).

Certificated carriers presently haul, in relatively small individual shipments and under published tariffs, a substantial amount of bulk traffic. Permitting a carrier which hauls exempt bulk commodities, through use of the Section 303(f)(2) towage exemption, to haul additional barges of non-exempt commodities in the same flotilla could result in substantial diversion to unregulated carriers of the bulk traffic which the regulated carriers now handle. It was apparently because of such considerations that Congress specifically rejected an amendment to the bill which would have permitted an otherwise exempt carrier of bulk commodities to carry for a regulated carrier a nonbulk commodity (automobiles) without loss of the Section 303(b) bulk commodity exemption. 84 Cong. Rec. 9980. For such a provision would have enabled a "bulk carrier who is entirely exempt from regulation * * * to destroy the service of the common carrier" subject to regulation in its carriage of automobiles (84 Cong. Rec. 9982).

The Commission consistently has held that "nonbulk commodities cannot be included in a tow of bulk commodities [otherwise exempt under 303(b)] without subjecting the entire cargo to regulation" (J. St. 41).[4] Similarly, the analogous exemption in Section 203(b)(6) for motor vehicles carrying only specified agricultural commodities[5] is lost if commodities not subject to Commission regulation are mingled in the same truck with otherwise exempt agricultural products. *Interstate Commerce Comm'n* v. *Dunn*, 166 F. 2d 116, 117 (C.A. 5); *Interstate Commerce Comm'n* v.

[4] See particularly *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796 (1955); *Ohio River Co. Contract Carrier Application*, 260 I.C.C. 501, 507 (1945); *American Barge Line Co. Applications*, 260 I.C.C. 783, 785-786 (1946); also compare *Arrow Tug & Barge Co. Ext.*, 265 I.C.C. 129, 138 (1947); *American Barge Line Co. Application*, 265 I.C.C. 231, 233, 235 (1947); *Portland Tug & Barge Co. Ext.*, 265 I.C.C. 325, 335 (1948); *Hyer Towing Co. Contract Carrier Application*, 250 I.C.C. 631, 633 (1943); *Inland Navigation Co. Applications*, 250 I.C.C. 703, 707 (1943); *Puget Sound Tug & Barge Co. Applications*, 250 I.C.C. 791, 794 (1943); *Connors Marine Co., Inc., Contract Carrier Application*, 250 I.C.C. 381, 385 (1942); *Jacob Rice & Sons Contract Carrier Application*, 250 I.C.C. 727, 729 (1943); *Mulqueen Contract Carrier Application*, 250 I. C.C. 436, 439 (1942).

Commission decisions also indicate that "liquid bulk," separately exempt under Section 303(d), is counted as one of the three permissible bulk commodities in determining whether the Section 303(b) exemption applies. See, *e.g.*, *Ralph Raike Applications*, 250 I.C.C. 177 (1942); *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I.C.C. 85, 88 (1943).

Appellants' reliance (J. St. 5, 7, 8, 19-20) upon an informal 1944 letter ruling by Division 4 that the Section 303(b) exemption for a barge carrying bulk commodities is not lost if nonbulk commodities (exempt under Section 303(f)(2)) are also included, ignores the fact that, as the Commission pointed out (*id.*, 41), "that ruling was, in effect, reversed" by Division 4 in *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796.

[5] Section 203(b)(6) exempts "motor vehicles used in carrying * * * agricultural commodities * * * if such motor vehicles are not used in carrying any other property, or passengers, for compensation."

Service Trucking Co., 186 F. 2d 400, 401 (C.A. 3), affirming 91 F. Supp. 533 (E.D. Pa.).

2. Contrary to appellants' contention (J. St. 17), the Commission's construction of Section 303(b) does not "in effect read * * * §303(f)(2) out of the Act." This argument ignores the basic distinction between the two exemption provisions. Section 303(f) (2) exempts from regulation "any person" (whether certificated or not) performing towage for regulated carriers, and subjects such towage to regulation through regulation of the carrier for whom the towage is performed. Thus, unlike Section 303(b), Section 303(f)(2) does not provide an exemption for the carriage of particular commodities, but for particular persons rendering specified services.[6]

As the Commission pointed out (J. St. 42), its reading of Section 303(b) does not impair the tower's continued personal exemption under 303(f)(2), which exists even though "a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities * * *." The sole effect of the Commission's ruling is to require "any person" who elects simultaneously to haul bulk commodities for shippers and to tow nonbulk commodities for carriers in the same flotilla to move his bulk traffic under regulation. The Section 303(f) (2) exemption continues to serve the important pur-

[6] Appellants contend (J. St. 14-15) that the effect of Section 303(f)(2) is to "treat" the "towage service" of a "tower for a certificated carrier" "as not constituting transportation within the meaning of any provision of the Act," and that their towage, therefore, is not "transportation" under Section 303(b). This argument overlooks the fact that Section 303(f)(2) itself recognizes that towage is "transportation" under the Act. For it exempts "transportation by water * * * in the performance of * * * towage" for a regulated carrier, and provides that "such transportation" shall be considered to be performed by the regulated carrier.

poses of enabling regulated carriers to hire independent unregulated exempt tows to supply additional service, and to perform towage for each other under reciprocal arrangements (see Congressman Wadsworth's illustration, 84 Cong. Rec. 9985-9986).[7]

Apart from appellants' unsupported assertions (J. St. 19-21), there is no showing that the Commission's decision is "directly opposed to the objective of efficiency and economy in transportation" (*id.*, 20). Issues as to the economic impact of a particular ruling on a highly regulated industry are preeminently for the Commission to determine, and in fact the Commission had the appellants' present contentions before it (*id.*, 40) when it held that bulk commodities become subject to regulation when mixed with nonbulk commodities in the same "vessel." This Court's language in *American Trucking Assns.* v. *United States*, 344 U.S. 298, 318, rejecting like arguments as to possible "economic danger" resulting from Commission rules regulating transportation of agricultural products, is especially pertinent:

> Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-

[7] Appellants' argument (J. St. 17, emphasis in original) that the 303(f)(2) exemption "can have practical value *only*" if it permits combined operations of the kind here involved assumes that other towing arrangements could in fact be performed under a charter or lease agreement permitted by Section 302(c). But that section applies only to a charter or lease "to a person other than a carrier subject to" Commission regulation, and only if the charterer or lessee is transporting "its own property" (J. St. 11). Standing alone, Section 302(c) would not permit the chartering or leasing of a tow to a regulated carrier, nor would it enable regulated carriers to perform towage operations for each other. These arrangements, therefore, could only be effectuated under Section 302(f)(2).

agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products. We can therefore find nothing in it which implies protection of agricultural truckers' right to haul other property, even though from an economic standpoint that right is important to protect profit margins. Regulated truckers must also receive protection upon their restricted routes and limited carriage. A balance between these competing factors, carried out in accordance with congressional purpose, does not seem to us unreasonable or invalid.

CONCLUSION

The decision below is correct, and the appeal presents no substantial question requiring plenary consideration by this Court. The judgment of the district court should therefore be affirmed.

Respectfully submitted,

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MARCH 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 900797 1527

Office-Supreme Court
FILED
APR 16
JAMES R. BROWNING

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REPLY TO MOTIONS TO AFFIRM.

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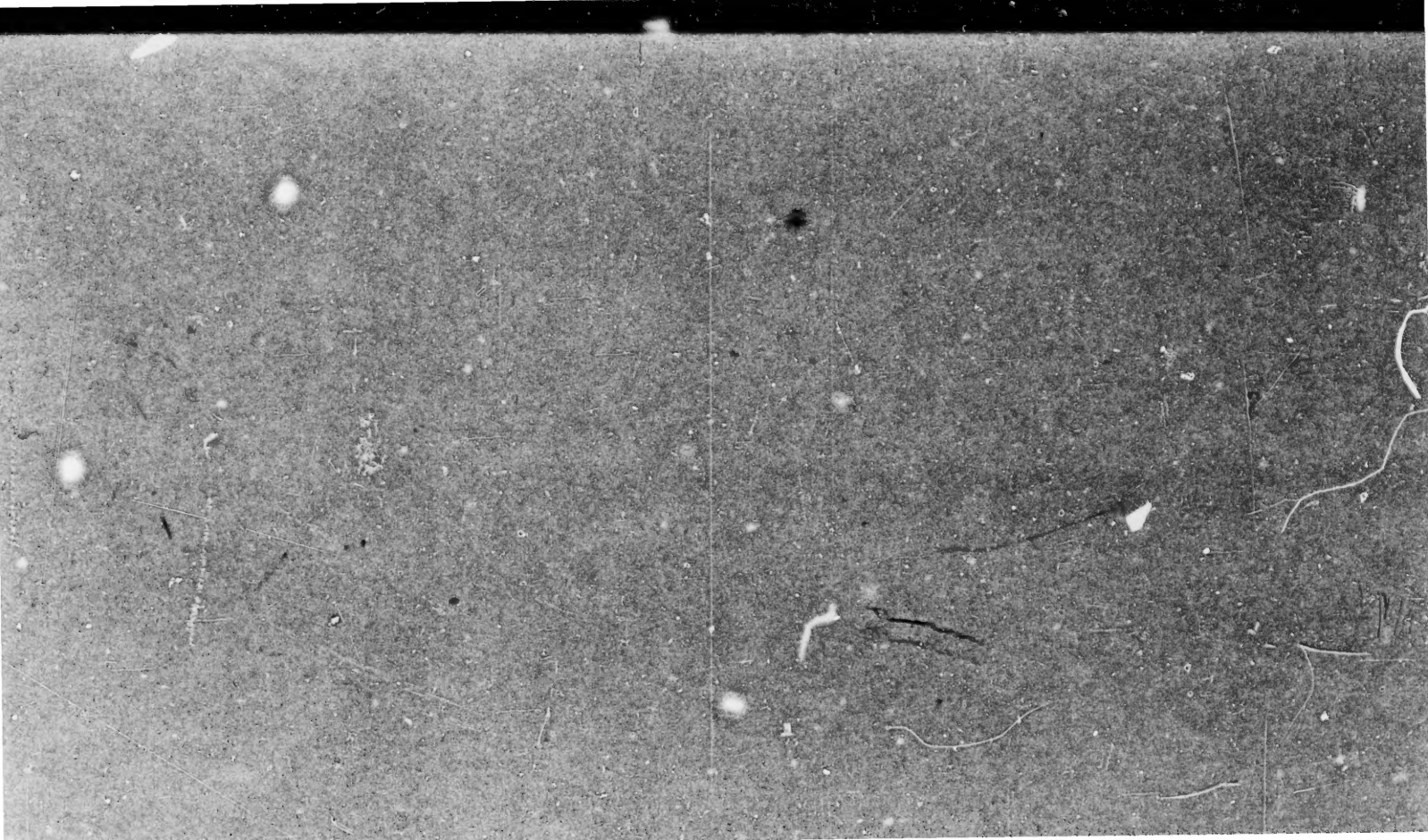

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The two Motions to Affirm filed in this case, one by the Government and the other by the carrier-appellees, urge an interpretation of the statutory provisions here involved which rests on a number of fallacies dealt with in Part I hereof. Certain factual statements in the Motions which are irrelevant, although apparently intended to be prejudicial, are dealt with in the interest of correctness in Part II hereof.

I.

The Fallacious Arguments in the Motions to Affirm.

A. The Anomaly of the Commission's Construction: Two Exemptions Are So Applied as to Result in No Exemption.

Both Motions to Affirm admit—indeed they proclaim—that the actual effect of the Commission's interpretation,

upheld below, will be to prevent any non-certificated carrier engaged in transporting bulk commodities by water under the Section 303(b) exemption from employing its tows in the performance of Section 303(f)(2) towage of non-bulk freight for a regulated carrier. This result is reached although admittedly Section 303(f)(2) provides that such towage is not subject to the Act.

Thus two exemptions add up to no exemption at all as a practical matter, when the unregulated carrier tries to take advantage of them. It is immaterial to him that the Commission considers that he has violated no law in performing the incidental towage itself, as long as the Commission couples this statement with the ruling that, immediately upon accepting the incidental towage, his movement of bulk traffic, previously lawful, has become unlawful. Nor is it any comfort to describe the two exemptions, as is done in the Government's Motion to Affirm, as a "personal exemption under §303(f)(2)" (p. 7), which survives, and a "narrow exemption" "for the carriage of particular commodities" (pp. 4, 7), which does not. These statements are a thin verbal disguise for the fact that the Commission has ruled that a bulk exempt carrier must not engage in incidental towage in spite of the language of Section 303(f)(2).

B. The Basic Error Below: Misunderstanding of the Statutory Function of Section 303(f)(2).

The arguments of both the Government and the carrier-appellees basically rest on a misconception of the relation of Section 303(f)(2) to Section 303(b). They treat Section 303(b) as if it existed in a vacuum and ignore the overriding statutory command in Section 303(f)(2).

Section 303(f)(2) by an overriding statutory definition constitutes towage for a regulated carrier as outside of "transportation" or "carrying" within the meaning of any

provision of the Act, including specifically any provision in Section 303.

This is accomplished by the language chosen to introduce Section 303(f). It reads:

> Notwithstanding any provision of this section [303] or of section 302 [the definition section[1]], the provisions of this part shall not apply • • •

The language just quoted is unique[2]. The phrase, "notwithstanding any provision of this section," gives subparagraph (f) preeminence over any other provision in Section 303, including subparagraph (b). The phrase, "notwithstanding . . . section 302," provides an overriding definition of what services constitute transportation *in law* within the meaning of the provisions of the Act. Legislative drafting in situations where an overriding exception is intended is most effective when that exception is stated in terms of definition. Thus in the New York Vehicle and Traffic Law,

---

[1] For the text of pertinent definitions see J. St. 10, Note 3.

[2] None of the subparagraphs of Section 303, other than (f), refers either to "this section" or to Section 302. In the other subparagraphs, the introductory language reads as follows:

"§303(b). Nothing in this part shall apply to . . ."

"(c). Nothing in this part shall apply to . . ."

"(d). Nothing in this part shall apply to . . ."

"(e)(1). Notwithstanding any provision of this part the Commission may . . . exempt . . ."

"(e)(2). It is hereby declared to be the policy of Congress to exclude from the provisions of this part . . ."

"(g). Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary . . ., the provisions of this part shall not apply to . . ."

"(h). The Commission shall have the power to determine . . . [and] [u]pon so finding the Commission shall issue a certificate of exemption to . . ."

"(j). Nothing in this part shall be construed to . . ."

"(k). Nothing in this part shall authorize the Commission to . . ."

it is carefully and expressly provided that a police car driven by a police officer is "not a motor vehicle" for purposes of that statute. *McKinney's New York Vehicle and Traffic Law*, §2(8).

As is developed in the Statement as to Jurisdiction (pp. 13-15), legislative history fully confirms the intention of Congress to use Section 303(f)(2) as a definition section so as to give the tower for a certificated carrier the status of a non-carrier as to that service and to treat towage service when performed for a certificated carrier as not constituting transportation ("carrying") by the tower within the meaning of any provision of the Act. To accomplish this purpose Congress carefully used the unique, all-embracing and overriding introductory language above quoted. When the clear purpose of Congress is given effect, the physical presence in the tow of the towed barge of non-bulk freight is not in law a circumstance which bears upon the Section 303(b) exemption.

If the physical make-up of the tow were the sole test of the Section 303(b) exemption, it would lead to the absurd result that a tower's provisions and supplies, some of which are non-bulk and all of which are "physically present" in the tow, would make the exemption unavailable. The Section 303(b) exemption is made inapplicable only when the cargo space in the vessel in question "is being used for the carrying" of more than three bulk commodities. For example, if a non-bulk commodity is transported by the operator of the tow as a carrier for hire within the meaning of "transportation" and "carrier" as used in the Act—as was the situation in the cases cited in the footnotes on page 6 of the Government's Motion (Note 4) and page 10 of the carrier-appellees' Motion—the exemption is lost.

But that which is not carriage under the Act cannot be treated as carriage under Section 303(b). Towage of non-

bulk freight for a certificated carrier is explicitly excluded from every section of Part III of the Act. Such towage is no more carriage by the tower than is the movement of tower's provisions and supplies which, though physically conducted in the tow, is clearly not carriage within the meaning of the Act.

Section 303(f)(2) is neither merely an exemption of a person nor is it concerned solely with the "legal status" of the tower (see pages 7 and 13 of the Government's and carrier-appellees' Motions, respectively). Rather, it is a categorical exclusion of "transportation by water by any person • • • in the performance • • • of towage" from all of the provisions of Part III, specifically including Section 303(b).

Section 303(f)(2) is not implemented by acknowledging its application to barges towed, but ignoring its plainly stated purpose of removing those barges from any and all regulatory consequences as to the tower thereof. To hold that a non-certificated operator may rely upon Section 303(f)(2) as to non-bulk barges towed for certificated carriers, but that such reliance destroys the Section 303(b) exemption of its own bulk carriage in the same tow, is to deny the effect of Section 303(f)(2) and to make its use impossible in the stated circumstances.

The two Motions to Affirm have overlooked or ignored this one basic point which is at issue. Thus the Motion of the appellee-carriers (pp. 2-3) states the "Question Presented" as involving a ruling that "section 303(b) . . . is inapplicable to a single tow of barges, which a water carrier is *transporting*, comprised of barges under its own bill of lading containing not more than three bulk commodities and other barges containing non-bulk commodities being towed for a regulated carrier under the towage exemption in section 303(f)(2)." (Emphasis added.) The vice of the state-

ment is the assumption that "transporting" is a word of common meaning. In fact it is a word of art. As it is used in the Interstate Commerce Act, Section 303(f)(2) expressly makes it inapplicable to the towing of "other barges being towed for a regulated carrier."

The Government on page 7, note 6, of its Motion acknowledges appellants' contention but fails to distinguish between transportation *in fact* and transportation *as defined by law.* The Government thus overlooks the effect of Section 303(f)(2) in constituting the service of towage for regulated carriers as non-transportation for all purposes of regulation. Consequently, the Government fails to come to grips with the basic point in the case.

Both Motions cite *Interstate Commerce Commission* v. *Dunn,* 166 F. 2d 116 (5th Cir. 1948), as if in support of the Commission's interpretation. The actual holding in *Dunn* is without relevance to any point here involved. There the Commission sought to enjoin a motor carrier from transporting agricultural commodities in interstate commerce under the exemption in Section 203(b)(6) of the Act because the vehicles had been used *at other times* in transporting other freight. The court sustained the exemption against that attack. By way of dictum, the court said that the exemption of interstate transportation of agricultural commodities would be lost if the vehicle were used simultaneously to transport other freight in intrastate commerce (p. 117). However, as is specifically noted in *Interstate Commerce Commission* v. *Service Trucking Co.,* 186 F. 2d 400, 403 (3rd Cir. 1950),—cited by appellees themselves—that was not the basis for the decision in *Dunn.* Nor did the *Dunn* case deal with statutory phraseology or factual circumstances like those involved in this case. It should be noted that the dictum in *Dunn* was based on the problem of policing the agricultural exemption if other commodities

could be carried simultaneously, provided they moved in intrastate commerce. Obviously, no similar problem is presented in connection with Section 303(f)(2) towage in a tow with bulk freight.

The carrier-appellees also cite *Peters Common Carrier Application*, 73 M. C. C. 331 (Entire Commission, 1957). However, that case, which was recently followed in *Yates, Common Carrier Application*, 74 M. C. C. 209, 211 (Division 1, 1958), clearly supports appellants', and not appellees', views with respect to the simultaneous effectiveness of two exemptions separately defined. Peters, a motor carrier, transported general freight in interstate commerce within the limits of a single state. So long as those were his "sole" interstate operations, the second proviso of Section 206(a)(1) of the Act excepted him from those required to have a certificate of operating authority from the Commission. However, Peters also conducted interstate operations in the transportation of agricultural products under the Section 203(b)(6) exemption. The question was whether the performance of those interstate operations, exempt as to the agricultural products carried, destroyed the single state exemption as to other commodities. The Commission held squarely it did not, saying at pages 335-336:

> "The phrase 'operation solely within any State' as used in section 206(a) should be construed in a restricted sense in conformity with the intention of the Congress expressed in section 203(b)(6) of the act. The propriety or necessity of thus construing the phrase is apparent, for all sections of an act should be in harmony with the intent of the act and with the intent of each section."

C. Neither the Purposes of Section 303(b) Nor the Purposes of the Act as a Whole Provide Rational Support for the Commission's Interpretation.

A convenient summary of the legislative history of Section 303(b) presented at a Congressional hearing in 1956[3] shows that the transportation of bulk freight on the inland streams was exempted from regulation because Congress considered such transportation entitled to the same exemption as bulk transportation on the Great Lakes. Congress reasoned that bulk transportation by water was noncompetitive with services rendered by regulated common carriers, whether by land or by water, so that regulation thereof was unwarranted.

Tested in the light of this congressional purpose, the adding of a barge of non-bulk freight being towed for a certificated carrier to a tow of bulk freight makes no change in this non-competitive relationship between bulk carriage and regulated common carriage generally. Consequently the original basis for exempting the transportation of the bulk freight still obtains, regardless of the added towage. This added towage is not done in competition with regulated common carriers; it is done for them. It follows that no apparent purpose of Section 303(b) with respect to the conditional exemption of bulk freight is defeated by the simultaneous operation of the Section 303(f)(2) exemption of towage.

In short, the simultaneous operation of these two exemptions is entirely consistent with all regulatory purposes of the Act. This follows since the barges towed for a regulated carrier under Section 303(f)(2) continue to be fully regulated as to such carrier within the regulatory framework

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[3] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 6141 and other bills, *Transportation Policy*, 84th Cong., 2nd Sess., Part 3 at 1513-28.

of the Act, while the three or less bulk commodities continue to be exempt from regulation as intended by Congress.

While appellees say that legislative history supports the interpretation accorded Sections 303(b) and 303(f)(2) by the Commission, their Motions show nothing which supports their claim. The single circumstance to which they point is the rejection of an amendment offered in the House by Mr. Pittenger which would have exempted bulk freighters on the Great Lakes from regulation with respect to the on-deck transportation of automobiles for other carriers (Government's Motion, p. 5; Carrier-Appellees' Motion, pp. 11-12). However, as the Commission itself notes in its report in *Water Carrier Services on the Great Lakes with Non-owned Vessels,* 285 I. C. C. 419, 423-24 (Division 4, 1953), that amendment was rejected because Congress feared that its purpose was to exempt the transportation of new automobiles from all regulatory provisions of Part III of the Act. That being so, the Motions to Affirm cite nothing from legislative history which supports the interpretation for which they contend.

II.

Certain Other Matters Included in the Motions to Affirm.

There are in the Motions to Affirm a number of factual statements which the appellants believe to be irrelevent to the legal question of statutory interpretation presented to the Supreme Court by this appeal.

Though irrelevant, they are apparently intended to be prejudicial. Furthermore, in considerable part, they are incorrect. Consequently appellants consider it necessary to deal with them sufficiently to correct these errors.

1. The Government's Motion is in error, no doubt inadvertently, when it states (pp. 2-3) that the appellants' corporate predecessors had as an *objective* of their merger in 1957 "the formation of an unregulated subsidiary corporation which, while transporting exempt bulk commodities for third persons, would, at the same time and in the same flotilla of vessels, perform towage for its regulated parent corporations." The evidence before the Commission taken at the hearings on October 17-18, 1956 in the merger case[4] showed that one of appellants' predecessors, as well as other non-certificated carriers engaged wholly in exempt transportation, performed extensively Section 303(f)(2) exempt towage in combination with Section 303(b) bulk freight transportation. That evidence also showed that many certificated carriers, including the carrier-appellees here, employed, as needed, the towage services under Section 303(f)(2) of a great number of non-certificated carriers who were simultaneously performing Section 303(b) bulk exempt transportation.[5]

It was the general and natural expectation that this situation would exist following the merger, since it had existed, exactly as described, for many years before, as authorized by the Commission's 1944 ruling. The carrier-appellees, who were the protestants in the merger case, urged, as one ground for their opposition, that the merger would facilitate such operations, and suggested (as far as appellants are aware, for the first time publicly) that such operations should not be permitted under the Act. Since appellants had then—as they have now—no desire

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[4] *Commercial Transport Corp.—Control and Merger*, 70 M. C. C. 535 (1957).

[5] See quotations from transcript in Brief of Petitioners of November 29, 1957, pp. 8-11 which, with all other briefs, constituted the record before the Commission which was filed in the lower court.

to violate or evade the law, and in order to sever this extraneous question from consideration in the merger proceeding, this proceeding for a declaratory order was initiated. Appellants simultaneously undertook that, if the Commission ruled against them as to the proper construction of the statute, they would promptly cease to engage in or use incidental towage of the type here at issue and would not again commence it unless the Commission's decision should be overruled by a court of competent jurisdiction. The appellants have strictly and in good faith complied with this undertaking since they made it in 1957. For the Government to permit the inference from its Motion to Affirm that the 1957 merger had as an objective the institution of such a practice of incidental towage, when the interruption of this long-established practice came, in fact, as an indirect result of the activities of the parties to the merger case, can only be an oversight.

2. The Motion to Affirm of the carrier-appellees contains a number of extravagant statements as to the position of the water carrier industry on the issue presented (pp. 3-4, 17). The simple fact is that the parties to this case are limited to those who were parties, pro and con, to the merger case. What the position is of the many score other regulated carriers and the many hundred other non-certificated carriers is not shown by the record here. However, their non-participation in the merger case and here argues that they desired no change in the 1944 ruling. If their position was or is otherwise, it is a reasonable assumption that they would have joined the carrier-appellees in the Commission proceeding.

A survey provided at a Congressional hearing in 1956, at which transportation regulation was under consideration, shows that the inland waterway barge and towing vessel operators at that time numbered 1,732. Of these,

163 were certificated common carriers, 41 were regulated contract carriers, 521 were private carriers, and 1,007 were contract carriers engaged in exempt transportation.[6]

Insofar as the position of the regulated segment of the industry may be of interest, it would seem significant that only five out of 163 regulated common carriers by barge appear here in support of the Commission's 1957 ruling.

3. Additional statements are made by the intervening carrier-appellees to the effect that the exemptions from regulation here urged by appellants are against the industry's best interests (Motion to Affirm, pp. 17-18). These statements are unsupported in the record and appellants believe unsupported by any rational economic analysis (See J. St. 17-21, Point I C, *supra*). In considering, however, what weight should be attached to the general position of the carrier-appellees on the construction of Sections 303(b) and 303(f)(2), it may be pertinent to note that the point of view expressed by them in the Motion to Affirm is one admittedly antagonistic to all exemptions whatsoever. The reasons of the competing railroads for joining in the Motion to Affirm are nowhere stated, but their natural and usual point of view is against any sound expansion or development of water transportation.

There are no findings in the report of the Commission, Division 4, with respect to the economic impact of the 1957 reversal of the 1944 ruling. However, Commissioner Arpaia directed a part of his dissent to that matter. He said:

> "Indeed, the purpose of section 303(f)(2) would be seriously impaired if the use of that exemption precluded reliance by the user of the section 303(b) exemption. That is to say, if a carrier performing incidental towage of nonbulk commodities thereby

[6] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 6141 and other bills, *Transportation Policy*, 84th Cong., 2nd Sess., Part 3 at 1494, 1513.

forfeits the section 303(b) exemption, he must either possess a certificate and move his own bulk traffic under regulation when performing incidental towage for another carrier, or he must limit the particular operation exclusively to the performance of incidental towage.

"The result would be to severely restrict the service of incidental towage and would produce wasteful transportation. An unregulated carrier would not want his bargeload included in the tow with other carriers' barges not subject to the exemption, because it would thereby lose its exemption. The practical effect of such interpretation would be therefore to limit the performance of incidental towage—a result directly in conflict with the purposes of section 303(f)(2)." (J. St. Appendix B, p. 43)

4. Traffic moved on the river in reliance upon the simultaneous availability of the two exemptions here in issue from 1944 to 1957, when the Commission first announced the decision here appealed from. The 1944 interpretation of the law was issued at the direction of the Commission, Division 4, after the Bureau in charge had refused to rule in favor of both exemptions, as urged at that time by the regulated barge industry. Appellants do not understand the relevance of the assertions by appellees that this 1944 ruling was "informal," and that it was issued in time of war when "every conceivable measure was being employed to move the maximum amount of traffic" (Government's Motion, p. 6; Carrier-Appellees' Motion, p. 16). (Perhaps the appellees consider the economic movement of the maximum amount of traffic to be inappropriate in time of peace.)

5. The Government's Motion to Affirm (p. 6) also quotes the statement of the Commission in its opinion below that "that ruling [the 1944 ruling] was, in effect, reversed" by Division 4 in *American Barge Line Company, Petition for Declaratory Order*, 294 I. C. C. 796 (1955). In fact, how-

ever, that decision, although it expressly referred to the 1944 ruling, neither reversed it nor questioned its correctness. The Commission in the *American Barge Line* case was dealing with the converse situation, where it is the bulk exempt carrier whose barges are added to a tow operated by a regulated carrier moving mixed commodities. In that situation, Section 303(f)(2) was inapplicable by its very terms since the principal in the transportation of the bulk freight was not "a water carrier subject to this part" as to that transportation. That case did not involve, as does the instant case, the impact of the performance of Section 303(f)(2) towage on the transportation of bulk freight clearly exempt in the absence of the towage. Consequently there was no occasion in that case to rule on the question here presented.

Conclusion.

For the reasons set forth herein and in the Statement as to Jurisdiction, appellants respectfully urge that the question submitted is substantial and of general public importance and that the Supreme Court should have the benefit of oral argument and briefs on the merits.

Respectfully submitted,

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April 16, 1959.